TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]18

ADELAIDE V. TILT, BENJAMIN B. TILT, JOSEPH W. CONGDON, AND JOHN R. CURRAN, AS EXECUTORS OF THE LAST WILL AND TESTAMENT AND CODICIL OF ALBERT TILT, DECEASED, PLAINTIFFS IN ERROR,

vs.

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK AND STATE OF NEW YORK.

FILED JANUARY 20, 1908.

(20,057.)

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SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Papers on appeal to court of appeals	*a*	1
Statement	1	1
Notice of appeal	2	1
Appraiser's report	3	2
Affidavit of Hamilton Wallis	13	8
Benjamin Tilt	14	8
Joseph W. Congdon	19	11
Benjamin B. Tilt	21	13
Benjamin B. Tilt	22	13
Deposition of Benjamin B. Tilt	23	14
Affidavit of Hamilton Wallis	37	25
Will and codicil of Albert Tilt	43	28
Order fixing tax	53	35
Appeal to surrogate	55	36
Stipulation on submission to surrogate	57	37

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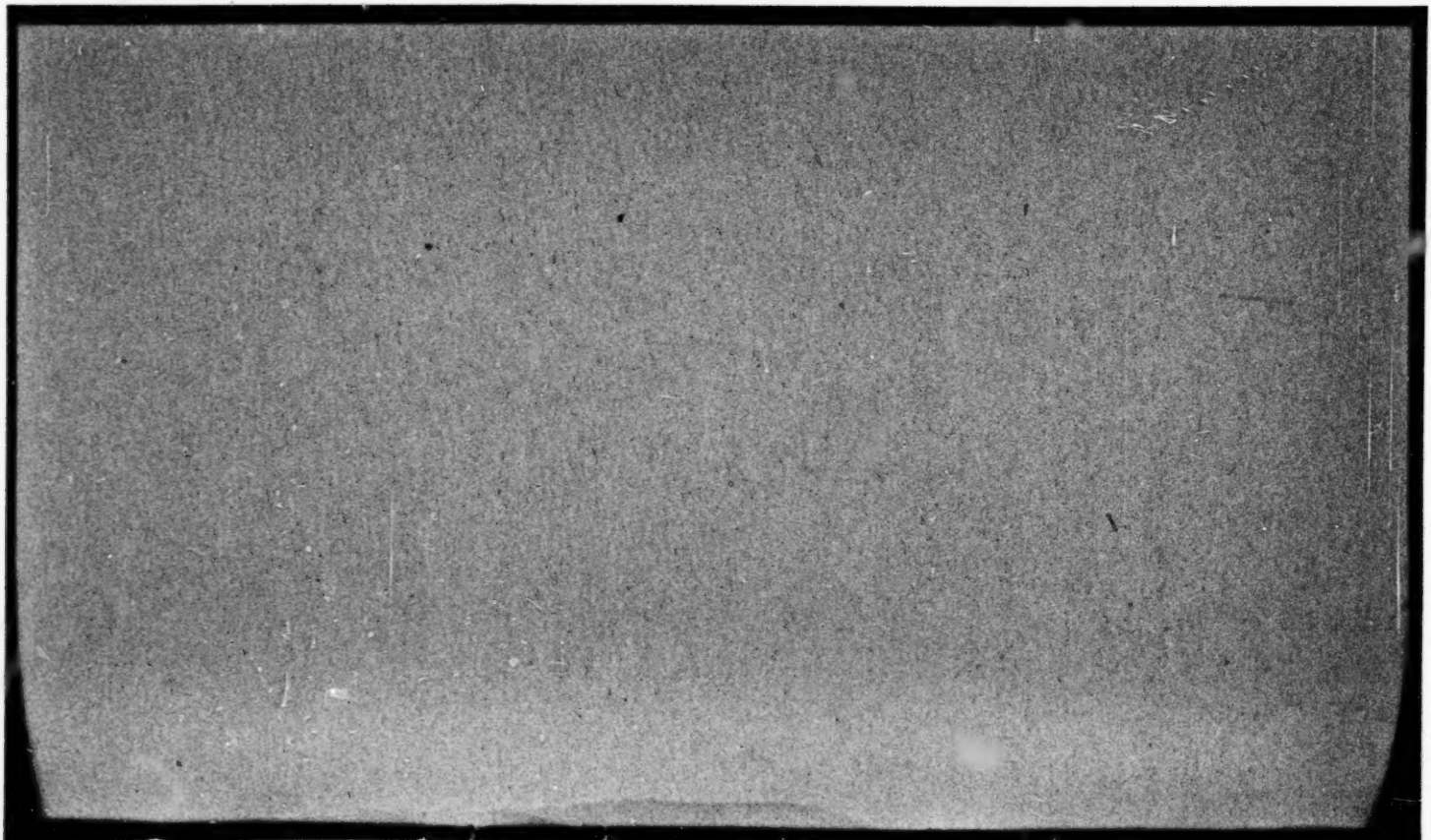
	Original.	Print.
Stipulation as to submission to surrogate	58	37
Opinion of surrogate	59	38
Finding of facts and conclusion of law	60	38
Executors' request to find	61	39
Refusal of requests	65	41
Order of surrogate affirming order fixing tax, May 5, 1905	66	42
Order resettling order of May 5, 1905	67	43
Exceptions	69	44
Stipulation settling case	74	47
Surrogate's certificate to case	75	47
Stipulation waiving certification	75	47
Order to file record in appellate division	76	47
Order of affirmance in appellate division	77	48
Notice of appeal to court of appeals	78	49
Stipulation waiving certification	79	49
Affidavit of no opinion in appellate division	80	49
Remittitur from court of appeals	81	50
Judgment on remittitur	83	51
Petition for writ of error	85	52
Assignment of errors	88	53
Writ of error	93	55
Bond on writ of error	96	56
Citation	102	59
Acceptance of service of citation	103	59
Reporter's statement of no opinion in court of appeals	104	59
Clerk's certificate	105	60



a Court of Appeals of the State of New York.

In the Matter of the Transfer Tax upon the Estate of ALBERT TILT, Deceased.

Papers on Appeal.

Edward H. Fallows, Attorney for State Comptroller, Respondent.
Wilson & Wallis, Attorneys for Executor, Appellants.

1 Appellate Division, Supreme Court, First Department.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

Statement.

This proceeding was commenced by a petition, and an order of the Surrogate of the County of New York on August 16, 1901, for the appraisal, under the act relating to taxable transfers of property, of the property of Albert Tilt, deceased. The persons originally named as known to have or claim an interest in the property claimed to be subject to tax are: Hon. Edward H. Fallows, petitioner; and Joseph W. Congdon, John R. Curran, Adelaide V. Tilt, Benjamin B. Tilt, Addie E. Acer, Albert Tilt, and S. W. Tilt. There has been no change of parties pending the proceeding.

The appraisal was made by Robert Mazet Esquire, appointed appraiser by the foregoing order. The question of the residence of the decedent at the time of his death was tried and determined by the Hon. Abner C. Thomas, Surrogate.

2 *Notice of Appeal.*

Surrogates' Court, County of New York.

In the Matter of Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

Take notice that Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran, executors of the last will and testament of Albert Tilt, deceased, appeal to the Appellate Division of the Supreme Court, First Department, from the order entered herein on the 5th day of May, 1905, as resettled and amended by the order entered herein on the 17th day of May, 1905, and from each and every part thereof.

Dated May 19, 1905.

WILSON & WALLIS,
Attorneys for Executors,
48 *Wall Street, New York City.*

To James A. Donnelly, Esq., Clerk of the Surrogates' Court, County of New York; Edward H. Fallows, Esq., Attorney for State Comptroller.

3 *Appraiser's Report.*

Surrogates' Court, County of New York.

In the Matter of the Appraisal, Under the Act in Relation to Taxable Transfers of Property, of the Property of ALBERT TILT, Deceased.

To the Surrogates' Court of the County of New York:

I, Robert Mazet, who was, by an order of Honorable Frank T. Fitzgerald, one of the Surrogates of the County of New York, made and entered on August 16th, 1901 (certified copy of which is hereto annexed), directed to Act as appraiser, pursuant to Chapter 908, Laws of 1896, and the Acts amendatory thereof and supplemental thereto, do respectfully report:

First. Having filed my oath of office in the State Comptroller's Office pursuant to Chapter 173, Laws of 1901, I gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property subject to the tax imposed by said law, to wit,—to the following persons, being those named in the petition for said order, of the time and place at which I would appraise the property
4 of Albert Tilt, deceased, subject to the payment of said tax; a true copy of said notice is also hereto attached:

Hon. Edward H. Fallows;
Joseph W. Condon;
John R. Curran;
Adelaide V. Tilt;
Benjamin B. Tilt;
Addie E. Acer;
Albert Tilt;
S. W. Tilt.

Second. I further report that at the time and place in said notice stated, to wit,—on September 6th, 1901, at 2:30 o'clock in the afternoon, at Room 1403, Home Life Building, 256 Broadway, Borough of Manhattan, New York City, and at other and subsequent times and at divers places, I appraised the estate of Albert Tilt, deceased, subject to tax herein, the same being wholly personal, at its fair market value, on the 2nd day of May, 1900, the date of his death, as follows:

Cash in Plaza Bank, N. Y. City.....	$2,901.21
Cash in 1st National Bank, Paterson, New Jersey.....	787.11
Cash to his credit in Phœnix Silk Mfg. Co., Paterson, N. J.....	149,257.22
Policy in Travellers' Life Insurance Co.	5,000.00
2 Policies Mutual Life Insurance Company of New York.....	20,000.00
4 Policies Equitable Life Ass. Association.....	28,445.00
2 Policies Manhattan Life Ins. Company	20,000.00

5	Mortgages (At 6% Per Annum:)	
	Rapshall G. See, Paterson, N. J.....	1,160.00
	Little Speaker, Mt. Arlington, New Jersey.....	800.00
	J. M. Harris, Pottsville, Pa.....	10,400.00
	Notes, etc.:	
	Louis L. Tilt, bal, at 6%.....	150.00
	Park Ave. Land Co., Paterson, N. J., Note of Dec. 31st, 1895, at 6% for $250, (nominal)	
	Note of Dec. 16, 1896, at 6%, for $250.	Nominal
	Loan at 6 per cent.....	Nominal
	Bal. salary as President Phœnix Silk Mfg. Co.....	1,933.34
	Amy H. Kellogg, at 6%, for $2,000...	(Nominal)
	Rent of Standard Hotel, 154th Street, N. Y. City.....	833.33
	Stocks:	
	5591 Shares Preferred Stock Phœnix Silk Mfg. Co., Paterson, N. J., par $50.....	279,550.00
	14187 Shares Common Stock Phœnix Silk Mfg. Co., of Paterson, N. J., par $50.....	529,762.50
	100 Shares Paterson Nat. Bank, par $100.....	20,000.00
	20 Shares Cedar Cliff Co., of Paterson, N. J., par $50.....	500.00
	20 Shares Broadway Land Co., of Paterson, N. J., par $50.....	500.00
6	20 Shares Park Ave. Land Co., of Paterson, N. J., par $50...	(Nominal)
	120 Shares H. S. Little Land Co., of Paterson, N. J., par $50.....	3,000.00
	150 Shares U. S. Phonograph Co., of Paterson, N. J., par $25.....	(Nominal)
	689 Shares Lake Hopatcong Club of Mt. Arlington, N. J., par $100.....	20,000.00
	Bonds:	
	2 Bonds N. Y. Athletic Club, 5%, 2nd Mortgage, due 1910.....	100.00
	Furniture:	
	In house 5 E. 67th St., N. Y. City.....	6,000.00
	In house 137 W. 71st St., N. Y. City...	2,000.00
	In house at Mt. Arlington, N. J., including naphtha launch.....	2,000.00
	Horses, carriages, etc., in stable 40 W. 66th St., N. W. City.....	3,000.00
	Total as per schedule.....	1,108,079.71

I further report that said gross personal estate is subject to the following deductions:

Cook & Calhoun	47.90	
E. C. Anderson & Co	31.90	
Alexander McConnell	319.85	
S. M. Crandall	624.50	
7 E. C. Anderson & Co	129.13	
Peter Celi	95.90	
Taxes on Paterson property	251.25	
Taxes, 1900, 64th Street property	335.45	
Taxes, 1900, 154th Street property	670.94	
Water tax, 154th Street property	61.70	
Taxes, 1900, property in Roxbury township	7.00	
William G. Grundy	55.88	
Dover Printing Company	6.60	
Internal Revenue Tax stamps, Paterson, N. B. stock	2.25	
Kellogg & Slosson	88.49	
William G. Grundy	70.58	
Benjamin B. Tilt	13.50	
Benjamin H. Atha	45.00	
Press Printing & Publishing Co	12.00	
Call Printing & Publishing Co	10.50	
John C. Stead	325.58	
A. H. Muller & Son, New York City, sale	256.25	
J. P. Storm, advertising	40.00	
United States Revenue stamps on deeds	80.00	
Wilson & Wallis, services and disbursements	3,633.35	
Surrogates' fees on final accounting as per Surrogate's decree of June 20, 1901	1,263.19	
Total, per schedule of expenses		$8,477.79
Alex. Boyd, professional nurse	175.00	
August H. Beaulieu	192.00	
8 Mrs. A. V. Tilt, servants' wages to may 1st	100.00	
James McGarrigle, coachman, to May 1st	200.00	
James McCreery & Co., bill	42.50	
B. Altman & Co	61.29	
P. L. Bogert, flowers for funeral	8.00	
Park & Tilford, bill	304.45	
Louis Mazetti	14.85	
Edison Elect. Light Co	58.10	
Slawson Brothers	33.76	
Samuel Budd	28.50	
New York Telephone Company	13.50	

Patrick Conway	85.30	
John Mullaney	253.20	
James Purcell, guardian wages	100.00	
New York Telephone Company, bill to May 1st	6.55	
Standard Gas Light Co., April 11th	7.28	
Consolidated Gas Light Company	3.44	
Consolidated Gas Light Company	4.16	
American Ice Company	18.21	
Delmonico Market	218.95	
George Paterson	43.05	
B. Altman & Co.	135.95	
Stern Brothers	35.00	
Fred E. Smith	34.50	
Eppinger Conservatory	37.50	
Interest on mortgage	575.60	
Cook & Calhoun	18.10	
Burke & McDermott	43.20	
W. W. Walker, M. D. S.	60.00	
Gas Engine Power Co.	83.60	
Berthe	70.75	
Thomas A. Kohn & Son	265.00	
9 Kaskell & Kaskell	27.09	
Northrop & Company	240.00	
Northrop & Company	99.00	
L. L. Danforth, M. D.	2,000.00	
Rogers, Peet & Company	11.00	
Brooks Brothers	62.13	
Interest on mortgage, Central Bridge Hotel	575.00	
Assessment, 154th Street property	126.13	
Assessment, 154th Street property	41.45	
Estate G. A. Hobart	550.44	
S. Blenheim & Sons	213.90	
D. S. Hess & Company	724.10	
Interest on mortgage, McComb's Dam property	422.19	
Personal tax	237.90	
J. B. Mulvey	176.00	
Total per schedule of debts paid		8,838.33
Commissions of executors		33,812.37
Total deductions		$51,128.49
Leaving a net estate of		$1,056,951.22

Third. I further report that Albert Tilt died on the 2d day of May, 1900, being at the time of his death a resident of the Borough of Manhattan, County and State of New York, leaving a last will and testament (copy of which is hereto annexed), which was duly

admitted to probate in the Surrogates' Court of the County of Morris, State of New Jersey, and that letters testamentary were issued by said Surrogate's Court to Adelaide V. Tilt of Mount Arlington, N. J., Benjamin B. Tilt, of 5 East 67th Street, Borough of Manhattan, New York City, Joseph W. Congdon, of Paterson, N. J., and John R. Curran, of Paterson, N. J., as executrix and executors.

10 That, by the terms of his will, testator disposes of his estate as follows:

Specific Legacies.

Adelaide T. Tilt, widow, Pictures, books, furniture, etc., in house 5 East 67th Street, Borough of Manhattan	$6,000.00
Horses and carriages	3,000.00
Paterson General Hospital at Paterson, N. J	2,500.00
St. Joseph's Hospital at Paterson, N. J	2,500.00
Paterson Orphan Asylum at Paterson, N. J	2,500.00
James McGerigle, not related	500.00
Albert Dowell, not related	1,500.00
Louis K. Tilt, cousin	10,000.00
John C. Dowell, not related	10,000.00
John R. Curran, not related	10,000.00
James W. Vert, not related	2,500.00
Peter Collins, not related	1,500.00
Henry Van Winkle, not related	1,500.00
William G. Grundy, not related	1,000.00
Mrs. Rush, not related	500.00
Adelaide V. Tilt, As Trustee for the widow and children of William H. Tilt and the children of S. Ivison, none of whom was related to testator	25,000.00
Addie Estelle Acer, daughter, Life estate in furniture.	2,000.00
Total specific bequests	$82,500.00

Leaving a net residuary estate of $974,451.22, which residuary estate testator disposes of as follows:

Adelaide V. Tilt, widow, One-fifth thereof	$194,890.24
Benjamin B. Tilt, son, One-fifth thereof	194,890.24
Albert Tilt, son, One-fifth thereof	194,890.24
William A. Tilt, son, One-fifth thereof	194,890.24
Addie Estelle Acer, daughter, Life estate in $194,890.24	194,890.24

The present value of which is $149,491, and the remainder thereon is $43,240.

11 Fourth: I further report that all persons interested in this estate are of full age and sound mind, except the following:

William A. Tilt, an infant over 18 years of age;

Addie E. Acer, who is three years of age;

Charlotte Acer, who is two years of age.

Fifth: I further report that the testator died seized of real estate,

but as the same passes by the terms of his will to his widow and children, no part thereof is taxable in this proceeding.

Sixth: I further report that the following appearances were made before me in this proceeding:

Hon. Edward H. Fallows, Attorney for State Comptroller;

Wilson & Wallis, Esqs., Attorneys for executors.

Seventh: I further report that I appraised the estate of Albert Tilt, deceased, subject to tax herein, at its fair market value on the 2d day of May, 1900, the date of his death, as follows:

Adelaide V. Tilt, widow, Furniture, books, etc.	$6,000.00	
Horses and carriages	3,000.00	
One-fifth of residuary estate	194,890.24	
		$203,890.24
Paterson General Hospital, Paterson, N. J., Interest in estate		2,500.00
St. Joseph's Hospital, Paterson, N. J., Interest in estate		$2,500.00
Paterson Orphan Asylum, Paterson, N. J., Interest in estate		2,500.00
James McGerigle, not related, Interest in estate		500.00
Albert Dowell, not related, Interest in estate		1,500.00
Louis K. Tilt, cousin, Interest in estate		10,000.00
John C. Dowell, not related, Interest in estate		10,000.00
12 John R. Curran, not related, Interest in estate		10,000.00
James W. Vert, not related, Interest in estate		2,500.00
Peter Collins, not related, Interest in estate		1,500.00
Henry Van Winkle, not related, Interest in estate		1,500.00
Mrs. Rush, not related, Interest in estate		500.00
William G. Grundy, not related, Interest in estate		1,000.00
Adelaide V. Tilt, As trustee for the widow and children of William H. Tilt, deceased, and the children of S. Ivison, none of whom is related to testator		25,000.00
Benjamin B. Tilt, son, One fifth of residuary estate		194,890.24
Albert Tilt, son, One-fifth of residuary estate		194,890.24
William A. Tilt, son, One-fifth of residuary estate		194,890.24
Addie Estelle Acer, daughter, Life estate in furniture		1,534.00
New Jersey Title Guarantee & Trust Company of Jersey City, as trustee for Addie Estelle Acer, daughter, Life estate in $194,890.24		149,491.00
New Jersey Title Guarantee & Trust Company of Jersey City, as trustee for Adelaide Acer and Charlotte Acer, grandchildren, Remainder after life estate of Addie Estelle Acer in one-fifth of residuary estate	$43,240.00	
Remainder interest in furniture	444.00	
		$43,648.00

Respectfully submitted,

ROBERT MAZET, *Appraiser.*

Dated New York City, March 6th, 1903.

13 *Affidavit of Hamilton Wallis.*

Surrogates' Court, County of New York.

In the Matter of the Appraisal for the Transfer Tax on the Estate of ALBERT TILT, Deceased.

COUNTY OF NEW YORK, *ss:*

Hamilton Wallis, being duly sworn, says that he is an attorney and counsellor at law of the States of New York and New Jersey, and was well acquainted with Albert Tilt, the above named decedent, and at the request of said Albert Tilt prepared for him his last will and testament, bearing date the 29th day of May, 1899, and the codicil thereto bearing date the 23rd day of February, 1900, which were respectively executed by said Albert Tilt on the said dates in the presence of deponent. That before the execution of the said codicil the said Albert Tilt consulted with deponent in regard to changes which he wished to make in his said will, and informed deponent that since the execution of the will he, the said Tilt, had changed his residence from the Borough of Manhattan, in the State of New York, to the Borough of Mount Arlington, in the State of New Jersey, and had removed all of his securities from the State of New York to the State of New Jersey, intending to reside there permanently; and the said Albert Tilt requested this deponent, in drawing said codicil, to state therein his change of residence; and by reason of such change he further stated that he wished to revoke the appointment, contained in the will, of the Fifth Avenue
14 Trust Company, of New York, as trustee of the trusts created for the benefit of his daughter, Addie Estelle Acer, and to appoint the New Jersey Title Guarantee and Trust Company, a corporation of the State of New Jersey, trustee of said trusts, in place of the said Fifth Avenue Trust Company.

HAMILTON WALLIS.

Sworn to before me this 2nd day of Dec., 1901.

EDW. O. KANNOFSKY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Affidavit of Benjamin B. Tilt.

Surrogates' Court, County of New York.

In the Matter of the Appraisal for the Transfer Tax on the Estate of ALBERT TILT, Deceased.

COUNTY OF NEW YORK, *ss:*

Benjamin B. Tilt, being duly sworn, says that he is a son of Albert Tilt, deceased, and one of the executors of his last will and

testament. That the said Albert Tilt died in the Borough of Manhattan, City of New York, on the 2nd day of May, 1900. That he left a last will and testament and codicil thereto, of which true copies are hereto annexed. That the said decedent, since the year 1889, had owned and maintained a residence at Mount Arlington,
15 in the County of Morris and State of New Jersey, and with his family and servants, occupied the same every year from about May to October or November, but kept the house open, furnished and ready for occupation in charge of servants the year round, and the same was frequently occupied for short periods by the said Albert Tilt or members of his family, at all seasons of the year. That during the same period, the said Albert Tilt also owned and occupied as a residence No. 5 East 67th Street, Borough of Manhattan, City of New York. That the said Albert Tilt, before acquiring a residence in the State of New York, had resided at Paterson, New Jersey. After coming to the City of New York to reside, he voted in said City down to the year 1899. During the summer of that year the said Albert Tilt occupied his residence at Mount Arlington, and frequently told deponent that he intended to abandon his residence in the City of New York, and become a resident of the State of New Jersey, and that he would make Mount Arlington his permanent residence, and vote and pay taxes there. Thereafter, the said Albert Tilt on several occasions made the statement in deponent's presence that he considered himself a resident of the State of New Jersey. He did not vote in the City of New York in 1899, as he had done regularly in previous years, and at the time of his death he claimed a legal residence in the State of New Jersey.

That in his said last will and testament and codicil, the said Albert Tilt appointed his wife, Adelaide V. Tilt, and his son, this deponent, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as executors of the said last will and testament and codicil. That on the 23rd day of May, 1900, the said last will and testament and codicil were duly admitted to probate, and letters testamentary thereunder were duly issued to the said executors, who all duly qualified as such, by the Surrogate of Morris County, in the State of New Jersey, the officer duly authorized and having competent jurisdiction under the law of said State to admit such will to probate and
16 grant such letters testamentary. That thereafter, pursuant to an order of the said Surrogate and to the laws of the State of New Jersey, the said executors caused public notice to be given and due advertisement to be made and published according to law, and as directed by said order, requiring all persons having claims against the said decedent or his estate to present the same to said executors for payment, on or before a date therein specified, but no claims were presented to the said executors against the said Albert Tilt or his said estate, except those specified in the schedules hereto annexed, all of which have been paid; and thereupon, on the 25th day of February, 1901, a decree was duly made by the Orphans' Court of Morris County, State of New Jersey, a court of competent jurisdiction in the premises, that all claims against the said de-

cedent or his estate not presented and proved as required by the said notice and advertisement be forever barred. That thereafter the said executors duly presented to the Orphans' Court of Morris County, being a court having jurisdiction thereof in the State of New Jersey, their accounts as such executors, and thereupon, after due advertisement, as required by the statutes of the State of New Jersey, such proceedings were had upon such accounting that on the 20th day of June, 1901, a decree of the said Orphans' Court was duly made and entered, allowing and passing the said account as filed, and after providing for the payment of the expenses of said accounting and the said executors' commissions, it was, in and by said decree, ordered and decreed that the sum found remaining in the hands of the said executors be distributed by them, according to the terms of the will of the said Albert Tilt, deceased. That such distribution has been made pursuant to the terms of said will, in accordance with the direction of said decree, and that there is now no property in the hands of the said executors belonging to the said estate.

That attached hereto is a true copy of the inventory of the said estate, filed by the said executors in the said Orphans' Court of Morris County. That the said inventory is full, true and
17 complete, to the best of this deponent's knowledge, information and belief, and contains a correct statement of the values of all of the personal property of the said testator at the time of his decease. That all of the said personal property, except cash on deposit in the Plaza Bank, furniture at 5 East 67th Street and 137 West 71st Street, and horses, carriages, etc., at 40 West 66th Street, New York, was in the State of New Jersey at the time of the death of said testator. That the Phœnix Silk Manufacturing Company, the Paterson National Bank, the Cedar Cliff Company, Broadway Land Company, the Park Avenue Land Company, The H. S. Little Land Company, the U. S. Phonograph Company and Lake Hopatcong Club, mentioned in said inventory, are all corporations organized under the laws of the State of New Jersey.

That annexed hereto is also a statement of all of the debts of the said testator and claims against his estate, including also the expenses of administration, executors' commissions and federal legacy taxes imposed on the legacies passing by the will of the said testator, imposed by the statutes of the State of New Jersey, amounting to the sum of $3,040, have also been paid by the said executors as required by said statutes.

That the names and addresses of all the persons interested in the said estate, are as follows:

Adelaide V. Tilt, the widow of the testator, residing at Mount Arlington, New Jersey, individually and as executrix;

Benjamin B. Tilt, a son of the said testator, residing at No. 5 East 67th Street, Borough of Manhattan, New York City, individually and as executor;

Albert Tilt, a son of the testator, residing at Ardsley Hall, Eighth Avenue and Ninety-second Street, Borough of Manhattan, New York City;

William A. Tilt, a son of the testator, residing at No. 5 East 67th Street, Borough of Manhattan, New York City;

Addie Estelle Acer, a daughter of the testator, residing at
18 No. 5 East 67th Street, Borough of Manhattan, New York City;

The said Adelaide V. Tilt, as testamentary guardian of the said William A. Tilt, appointed by the Surrogate of Morris County, New Jersey;

The New Jersey Title Guarantee and Trust Company of Jersey City, New Jersey, a corporation of the State of New Jersey, as trustee under the last will and testament and codicil thereto of the trusts therein created for the benefit of the said Addie Estelle Acer;

Adelaide Acer, a granddaughter of the testator, daughter of Addie Estelle Acer;

Charlotte Acer, a granddaughter of the testator, daughter of Addie Estelle Acer;

Joseph W. Congdon, an executor of the said last will and testament and codicil, who resides at Paterson, N. J.;

John R. Curran, an executor of said last will and testament and codicil, who resides at Paterson, N. J.

That all of the above named persons are of full age, except William A. Tilt, who is eighteen years of age; Adelaide Acer, who is three years of age; and Charlotte Acer, who is two years of age. That the said Addie Estelle Acer was twenty-seven years of age on the 30th day of November, 1901.

That the Federal Legacy Tax upon the said estate and upon all legacies taxable under the United States Internal Revenue laws has been assessed and collected by the Collector of Internal Revenue for the District of New Jersey.

BENJAMIN B. TILT.

Sworn to before me this 4th day of Dec., 1901.

EDW. O. KANNOFSKY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

19 *Affidavit of Joseph W. Congdon.*

Surrogates' Court, County of New York.

In the Matter of the Appraisal for the Transfer Tax on the Estate of ALBERT TILT, Deceased.

COUNTY OF NEW YORK, *ss:*

Joseph W. Congdon, being duly sworn, says that he is one of the executors of the last will and testament and codicil thereto of Albert Tilt, deceased, and resides at Paterson, New Jersey. That deponent was well acquainted with said Albert Tilt, and had been associated with him in business for upwards of fifteen years prior to his death, as officers and directors of the Phœnix Silk Manufacturing Com-

pany, a corporation of the State of New Jersey, having its factories and offices at Paterson, New Jersey. That the said Albert Tilt was president of the said company for twenty two years before his death, and deponent, during fifteen years of the same period, was vice-president of said company. Deponent was familiar with the business affairs and interests of the said Albert Tilt. His principal business interest was in the said Phœnix Silk Manufacturing Company, the stock of which he held to the amount of $985,900. par value, inventoried at $809,312.50. He resided in Paterson until about the year 1888, when he removed to the City of New York, but his business relations remained the same after his removal as before, and nearly all of the enterprises with which he was connected
20 and investments made by him at any time were in New Jersey. For many years he kept a personal account at the First National Bank of Paterson, and at all times had very large sums of money deposited with or loaned to the Phœnix Silk Manufacturing Company, amounting, at the time of his death, to $149,257.22. He was never engaged in any business in the State of New York, and had no investments there except in real estate, and no other property except household furniture, horses and carriages, &c. For many years, and at the time of his death, he had a home at Mount Arlington, New Jersey, where every year he spent several months with his family, taking servants, horses and carriages with him, and kept the house open ready for occupancy all the year round. He spent the summer of 1899, there, as usual, and frequently during that time he stated to deponent that he intended to take up his permanent legal residence there, and vote and pay taxes in New Jersey. Later he talked with deponent about making a change in his will, and stated that he no longer considered himself a resident of the State of New York, but of New Jersey, and that he wished to have his will changed so as to express his change of residence, and he requested deponent to accept the appointment as one of the executors of his said will. That it appears from the codicil to said will which was made about the time above referred to, that the testator therein appointed as executors in the place of his son, Albert Tilt, a resident of New York, this deponent and John R. Curran, both residents then and now of the State of New Jersey. The said testator further stated to deponent at or about the time the said codicil was made that he had removed all of his securities from the State of New York to New Jersey, as he wished to have his property in the State where he resided. After the making of said codicil, the said testator on several occasions spoke of himself as a resident of New Jersey, and, in the opinion of deponent, he considered
21 himself a *bona fide* legal resident of that State, and not of the State of New York.

JAS. W. CONGDON.

Sworn to before me this 11th day of Dec., 1901.

G. A. HEIDENFELDER,
Notary Public, New York County, No. 58.

Affidavit of Benjamin B. Tilt.

Surrogates' Court, County of New York.

In the Matter of the Appraisal for the Transfer Tax on the Estate of ALBERT TILT, Deceased.

COUNTY OF NEW YORK, *ss:*

Benjamin B. Tilt, being duly sworn, says that he is a son of Albert Tilt, deceased, and one of the executors of his last will and testament. That from about 1889 to 1899 the said Albert Tilt did not vote nor pay poll taxes in the State of New Jersey, but did vote in the State of New York until the year 1899, when he abstained from voting either in New York or New Jersey. For several years before his death, including the year 1899, he paid a personal property tax to the Town of Roxbury, in which his home at Mt. Arlington, New Jersey, is situated, and the said tax for the year 1900 was paid after his death, by his executors, who also paid the tax assessed on his personal property in the State of New York for the year 1900. The said Albert Tilt was not confined to his house
22 until about a week before his death. After making the codicil to his will, in February, 1900, he went out to drive almost daily, as he had been in the habit of doing before, and on two occasions went to the store of Greeff & Company, 105 Spring Street, New York, the selling agents of the Phœnix Silk Manufacturing Company, and transacted business. His house in New York was kept open the year round, in charge of caretakers and ready for occupancy, when not occupied by the family.

BENJAMIN B. TILT.

Sworn to before me this 18 day of Dec., 1901.

G. A. HEIDENFELDER,
Notary Public, N. Y. Co.

N. Y. Surrogates' Court.

In the Matter of the Appraisal for the Transfer Tax on the Estate of ALBERT TILT Deceased.

COUNTY OF NEW YORK, *ss:*

Benjamin B. Tilt, being duly sworn, says that Albert Tilt, the above named decedent, occupied his residence, No. 5 East 67th Street, New York City, from about January 1, 1900, to the time of his death on the 2nd day of May, 1900, and did not go to the State of New Jersey during that time.

BENJAMIN B. TILT.

Sworn to before me this 15th day of Jan., 1902.

G. A. HEIDENFELDER,
Notary Public, New York Co., No. 58.

23 *Deposition of Benjamin B. Tilt.*

Surrogates' Court, County of New York.

In the Matter of the Appraisal, Under the Act in Relation to Taxable Transfers of Property, of the Property of ALBERT TILT, Deceased.

Hearing before Appraiser Robert Mazet, Room 1403, Home Life Building, 256 Broadway, Borough of Manhattan, New York City, April 4th, 1902.

Appearances: Hon. Edward H. Fallows (Mr. Milne), Attorney for State Comptroller. Wilson & Wallace (G. E. Coney), Esqs., Attorneys for Executors.

BENJAMIN B. TILT, being sworn, testified:

Examined by Mr. MAZET:

Q. Where do you reside, Mr. Tilt?
A. 5 East 67th St.

By Mr. MILNE:

Q. How long prior to the alleged change of domicile had Albert Tilt been talking of changing his domicile?
A. Before he made the codicil he had been talking about it for some time.
Q. About how long?
A. I suppose four or five months.

24 By Mr. MAZET:

Q. The codicil was made in March, wasn't it?
A. March, I think.

By Mr. MILNE:

Q. How frequently did he talk with you of such intention?
A. Every now and then.
Q. Frequently?
A. Very frequently.
Q. How short a time before his death was he talking to you about it?
A. When he made the codicil; he did that so as to provide—that is, to show that he was a resident of New Jersey, having talked about it before hand. It was with that intention that he made the codicil—he talked about it same time before he made the codicil, and to make sure of it he made the codicil, and after that he talked a good deal about it, of course.
Q. In talking with you about this alleged intention of changing his residence from New York to New Jersey, what did he say—what were the words he used in the matter?
A. Simply he thought it would be better to be a resident of New

Jersey as he was a member—or president—of the Phœnix Silk Manufacturing Company in New Jersey, and he had lived there practically for 14 or fifteen years—in Paterson, N. J., and because he came to New York, and it was nearer his main office—that is, the selling part of the business—but as the company was incorporated in New Jersey and he had lived there a great many years and most of his stocks—bank stocks—were not here—stocks in Paterson, New Jersey.

Q. How far is Arlington from Paterson, N. J.?

A. About 30 miles.

Q. How far is Paterson from New York City?

A. 16.

Q. Did Albert Tilt belong to any literary or official club in New York prior to the alleged change of domicile?

A. I don't think he did.

Q. Did he belong to any political organization or club in New York City prior to his alleged change of domicile?

25 A. The Republican Club and Lotus Club, and the Metropolitan Club.

Q. What clubs did he belong to in New York City?

A. A member of the Riding Club, the Metropolitan Club, the Republican Club; and he was a member of the Lotus—I am not sure whether he was at the time of his death.

Q. When did he cease to be a member of these organizations?

A. He was a member very long before his death.

Q. Did he belong to any church society or church organization in New York City prior to his alleged change of domicile?

A. He was a member—he was a vestryman in All Souls Church on 66th Street and Madison Avenue.

Q. Did he rent a pew therein?

A. Yes.

Q. After his alleged change of domicile to Mount Arlington, did he retain a pew in that church?

A. We still have the pew, and he had it up to the time of his death.

Q. Did he have any official relation—did he occupy any office in that church organization?

A. As a vestryman, yes.

Q. When did he cease to be vestryman of that church?

A. He never resigned as vestryman.

Q. Was he a director in any national or city bank in New York City?

A. No.

Q. Was he a partner or a member of any manufacturing or business firm or corporation in New York City prior to his alleged change of domicile?

A. No, never has been—never was.

Q. Did he ever entirely abandon his New York home?

Mr. CONEY: I object to that as a conclusion of law; not a question of fact at all.

(Question not pressed.)

Q. Did his occupation of, or his mode of living at, his New York residence differ in any respect after this alleged change of residence from what it was before such change?

A. He never intended to leave New York and live in New
26 Jersey all his life. There was no difference, no. I think he lived a little longer in New Jersey—that is to say, his summer residence—his residence in Mt. Arlington was longer by a month after he made the codicil than it ever had been before.

By Mr. CONEY:

Q. You don't mean after making the codicil?

A. I meant before. Just at that time.

Q. Did he enter into any new business relations at his alleged new domicile at Mt. Arlington?

A. He was one of the directors of the park—one of the governors of the club—the Lake Hopatcong Club—which was the leading.

Q. Was he elected to these offices before or after making of the codicil?

A. Before.

Q. Was he ever a member of any church society or church organization in Mt. Arlington after his alleged change of domicile?

A. He supported the church there at Mt. Arlington, though no membership of the church was necessary—he supported the church for some years, and was one of the main supports of the church—in fact, he was interested in the church.

By Mr. MAZET:

Q. When did he become a director of the Hopatcong Club?

A. About 5 years ago.

Q. That was while he claimed a residence in New York, was it not?

A. Yes, when he was a resident of New York.

By Mr. MILNE:

Q. You say that he contributed to the support of the church in Mt. Arlington; didn't he contribute to the support of the same church before the making of the codicil?

A. Yes.

By Mr. MAZET:

Q. And his trusteeship in the park association—how long prior to his death was he——

27 A. (Interrupting). Several years prior to his death; but the only point is the pleasure—the interest in the place, and his willingness to become a resident of that place.

Q. His codicil—the last codicil—was made in March?

Mr. CONEY: February, 1900.

Q. The 23d day of February, 1900, his codicil is dated, and he died on the 2d day of May following, didn't he?

A. Yes.

Q. And during that time—where was he in the meantime—where did he reside?

A. In the meantime?

Q. Between the time of making the codicil and up to the time of his death, where did he live—what premises did he occupy?

A. 5 East 67th Street.

Q. How long was he ill?

A. He was ill for just about a year.

Q. Then, if I understand your evidence correctly, he removed to New York in the fall of '99, did he not?

A. Yes.

Q. For the purpose of living here during the following winter?

A. Well it was—his most comfortable house was in New York, and his office—the selling part of his business was here; and, of course, he had to be here quite a good deal, and being once ill, he was so ill he couldn't get out of the place.

Q. From the time of making his codicil to the time of his death, he was ill all the time, wasn't he?

A. Yes, he was; in fact, unable to go out of the house.

Q. Did he ever leave the house from the time of making the codicil to the time of his death?

A. Once or twice for taking a drive.

Q. That was all?

A. That was all. He felt a little better—he was under the influence of morphine all the time; he could not possibly have gone out of time even if he wanted to.

By Mr. CONEY:

Q. You stated that he stayed a month longer after the making of the codicil than he had in previous years. Now, the date
28 of the codicil is February 23d; do you wish to correct that statement?

A. After making the codicil he did not reside in Mt. Arlington at all—after making the codicil.

Q. Didn't go to New Jersey, did he?

A. No.

Q. After the making of the codicil——

A. (Interrupted.) I misunderstood that question.

Q. The subject of the change of domicile—change of residence from New York to New Jersey; when, according to your recollection did your father first say anything about irrespective of the time of the execution of his will or the codicil or anything else—when did he first mention the subject of changing his residence from New York to New Jersey?

A. I would say that is about the time we left for our country home in June of '99.

Q. What did he say at that time?

A. He simply said he had often thought, as a great many other people have often thought of changing their residence from New York to their country home.

Q. That was in June of '99?

A. Yes. It was all a question of whether he shouldn't live up there; he was often asked to become mayor of Mt. Arlington—H. P. Frothingham was mayor at the time, and they wanted my father

to become mayor of the place, and he often thought of voting up there and taking his interests up there—it was a small place and they wanted to build it up.

Q. Now, from June, 1899, he lived in New Jersey, did he not?

A. Yes, until the middle of October; I think, when he left for New York.

Q. Then during that time, did he have anything further—did he say anything further in regard to changing his residence?

A. He talked about it all summer long.

Q. What did he say, if you recall, as to his having changed or having any further intention in regard to changing his residence?

A. Simply said that he had decided absolutely to change his residence, and then he was going to vote in Mt. Arlington that fall.

Q. What was his state of health after he came back to
29 New York?

A. He was then very seriously ill—he was practically bedridden.

Q. What did he state, if anything, in regard to making a codicil to his will, that you know of?

A. I don't remember anything in regard to that, except that—that he had to make that codicil in order to change the trust company from New York to New Jersey.

Q. You heard him say so?

—. Yes.

Q. Did you ever hear him state to yourself or to any one else whether or not he considered himself a resident of New York or New Jersey?

—. Yes, I did.

Q. When?

A. Right along the latter part of that summer after he had talked about it so much; and then he made the codicil—that was to show that he had absolutely become a resident of New Jersey.

Q. And did he so state to you?

A. Yes, he did.

Q. More than once?

A. Yes, several times.

Q. Did you ever hear him make that statement to General Congdon?

A. Yes, several times.

Q. Did he state that he was going to make a codicil to his will for the purpose of changing his residence, or because he had changed his residence?

A. Because he had changed his residence.

Q. What did he say about changing the trust company in New York? Did he say that he was going to change from the Fifth Avenue Trust Company to the New Jersey Title Guarantee & Trust Company for the purpose of changing his residence, or because he had changed his residence?

A. Because he had—he had to have the trust company in New Jersey—he was trustee for my sister.

Q. Didn't he make that statement in your presence to Gen. Congdon?

A. I think he did, in my presence.

Q. Didn't he ask General Congdon to become an executor of his will under the codicil—to accept the appointment as executor of the will—because he had become a resident of the State of New Jersey?

A. Yes.

Q. And when was that? Was it before or after the making of the codicil?

A. I don't quite understand you.

30 Q. General Congdon was appointed executor of your father's will by the codicil?

A. Yes.

Q. Did he not before the execution of that codicil ask General Congdon to become an executor of his will, and state to him then that he had changed his residence from the State of New York to the State of New Jersey?

A. Yes, some time before the codicil.

Q. Was it as early as November, if you remember?

A. That is pretty hard—sometime between November and December—I should say about November. It was late that fall—in the beginning of the winter.

Q. What position did your father occupy—official position—in the Phœnix Silk Manufacturing Company?

A. He was president and director.

Q. Did that company have an office in New York?

A. It had an agency—that is, an office for transacting what business they had to do—it was not on a large account; their main business was in Paterson, N. J.

Q. Were any of the books of the company kept in New York?

A. Not one.

Q. Where were they kept?

A. In Paterson—in the office in Paterson—the main office.

Q. Who were the selling agents for the company?

A. Greeff & Company .

Q. They are still?

A. Yes.

Q. Did your father have an office there?

A. In that building,—he had an office where he had a desk in order to transact what business he had to do in New York.

Q. How often did he go there?

A. He was there about 3 times a week.

Q. How long did he stay?

A. He wasn't there to stay except once in the past year—at the time of his illness.

Q. How long did he stay there when he went there when he was ill?

A. His hours were rather irregular as far as that office was concerned; he was there just as seldom or just as often as he desired to.

Q. He had no regular duties or occupation to call him there that had to be transacted daily?

A. He was the president of the company, had to keep

31 watch of the selling of his goods, and being the manager of the New York office.

Q. He simply acted in a supervisory capacity?
A. Yes sir; and buying the raw material.
Q. It was for the purpose of convenience?
A. More or less, yes. The business of the company was transacted entirely in Paterson.
Q. The business of the Silk Manufacturing Company was the manufacture of silk from the raw silk?
A. Yes.
Q. These goods were sent from Paterson to Greeff & Company as selling agents?
A. And they sold them.
Q. Did your father have anything to do with the sale of the goods?
A. No, not a thing except to make the prices.
Q. That is, the prices were made not in detail as each sale was made, but they were prices which were made——
A. (Interrupting.) Set for the season; and Greeff & Company took the responsibility—guaranteed—in fact, took everything off the hands of the company—took the goods on consignment.
Q. After those prices were made, the detail of the business was something that was in their hands?
A. Exactly.
Q. That had been the case for years, had it not?
A. Yes.
Q. Did your father have any investments or any business interests in the City of New York, of any description, other than his connection with Greeff & Company that you have described?
A. No.
Q. Did he have any property in New York?
A. He had real estate.
Q. Except real estate?
A. He had real estate.
Q. And household furniture?
A. And household furniture.
Q. Horses and carriages?
A. Horses and carriages.

By Mr. MAZET:

Q. Did he have any bank account?
A. Only a small cash account for convenience—Plaza Bank.

32 By Mr. CONEY:

Q. He had a bank account in the Plaza Bank, didn't he?
A. Yes, really a cash account.
Q. Did he have any other bank account?
A. No.
Q. I mean anywhere.
A. In Paterson.
Q. What bank, if you remember?
A. I think it was the Second National.
Q. The First National Bank?
A. The First National, yes.

By Mr. MAZET:

Q. Is that an individual account?
A. An individual account.

By Mr. CONEY:

Q. How long had that account been kept there?
A. It had been kept there for a good many years.
Q. As long as you can remember?
A. Mr. Curran, who is the treasurer of the company, paid out a great deal for bills for my father, as his attorney.
Q. Acting under power of attorney?
A. Acting under power of attorney to sign checks for him.
Q. Household bills here in New York?
A. Yes.
Q. Paid out of the Paterson bank account?
A. Paid out of the Paterson bank account.
Q. And that continued to be so down to the time of your father's death, didn't it?
A. Yes, and for some years previous.
Q. And accounts with dry goods stores and other tradesmen run up by members of the family; what was the usual practice in regard to those?
A. Father used to pay a great many of them, but some of them he would send out to him to pay.
Q. Wasn't it the fact that a great bulk of the household expenses of the members of the family—the bills were sent to your father and your father sent them out to Mr. Curran to pay from funds from the Paterson bank account?
A. Yes, sir.
Q. You have mentioned several clubs that your father belonged to; do you know whether there is any prohibition on non-
33 residents being members of those clubs?
A. No.
Q. Do you know of any time when your father attended those clubs after his return to New York in the fall of '99?
A. I don't think he visited one of them in that time. From the time he returned in 1899 up to the time of his death, I don't believe he was in a club in the city.

By Mr. MAZET:

Q. He was confined to the house, wasn't he? Was he in bed?
A. Well, not in bed, exactly; he was practically bed-ridden; I mean he had been wheeled around the room, and at times when he was under morphine, he would be sufficiently strong to go out driving, and once he came down to the store.

By Mr. CONEY:

Q. He had gone out driving, hadn't he, almost up to the time of his death?
A. Yes, within a month of the time of his death—less than that,—within 3 weeks of the time of his death he took a drive.

Q. What is this church at Mt. Arlington? What kind of a church is it?

A. Episcopal church.

Q. The same denomination as the one in New York?

A. The same denomination. He was also a member of the Hamilton Club in Paterson.

Q. Mt. Arlington is quite near Lake Hopatcong, isn't it?

A. Mt. Arlington is Lake Hopatcong; Mt. Arlington is the railroad station and the name of the town.

Q. Your father was considerably interested as a property owner and as a promoter of all the Lake Hopatcong enterprises, was he not?

A. Yes, that is around the park—the Park Association part of it.

Q. You have spoken of the Lake Hopatcong Club; I believe he was a member?

A. Yes. It is a stock corporation.

Q. Who is the principal owner of that?

A. My father owned 5/8 of the stock.

Q. The nature of this park association—what was that, a
34 real estate association?

A. No, it was an association formed in order to keep the park in proper shape, the roads, and look out for the property in general—build up the place.

Q. Beautify its surroundings?

A. Beautify its surroundings.

Q. Was that a stock company?

A. No, I don't think it was.

Q. Who promoted the organization of that company? Were they residents of Lake Hopatcong?

A. One was the mayor of Lake Hopatcong,—H. P. Frothingham—at the time; one was Robert Dunlap—I don't know whether he was a resident—I don't know whether he had any property up there; another one was Mr. Henry Attenbrand of Brooklyn.

Q. And your father was one of them?

A. Yes, he was one of them; there are three or four others.

Q. Mr. Tilt, did you ever hear your father, at any time during the summer of 1899, allude to either of his residences in New York or Lake Hopatcong as his home?

A. Simply that he had decided to call his residence in Mt. Arlington after that.

Q. His home?

A. His home.

Q. What was this residence at Lake Hopatcong? Was it simply a summer cottage?

A. You might call it that; it was large enough to be a residence for the whole year round.

Q. Was it fitted out for occupation in any season of the year?

A. It was always open—we always had a man living in the house all the year round—ready for occupancy at any time of the year.

Q. And was actually occupied wasn't it?

A. Always occupied all the year round.

Q. I mean by members of your family?

A. Yes.

Q. At all seasons of the year?
A. At all seasons.

By Mr. MILNE:

Q. You say your father returned from Arlington to New York about October?
A. Yes.
Q. What was the state of his health then?
A. He seemed to be a little better then than he had been during the latter part of the summer when he had to be taken home in a private car from Hoboken—he was taken home in an ambulance.
Q. He was sick when he returned to New York?
A. Yes, very ill.
Q. You said on the direct examination that he spoke during the summer as a great many others do that he thought he should change his residence to New Jersey.
A. Yes.
Q. And on the cross-examination you say that he did say that his residence was New Jersey; which do you want us to understand by that?
A. Simply, he talked about it, and decided to change, and had changed in his mind; I don't know how a man could otherwise change.
Q. You don't quite get my question. On the direct examination, you answered to my question, that he was talking during that summer, as a great many other people do, about changing his residence, that he thought he should change his residence; now on the cross-examination, you say that he told you that he had changed his residence.
A. He did the latter part of the summer; he had talked about it all during the summer—the latter part of the summer he decided absolutely to change.
Q. You say that he used to be in the New York office about 3 times a week?
A. Yes.
Q. How often was he in Paterson?
A. He was in Paterson about once or twice a week.
Q. After he moved from Paterson to New York, he became a citizen of New York.
A. He voted there.
Q. He became a citizen of New York?
A. Yes.
Q. And he was a citizen up to the time, in your judgment, that he made this alleged change of residence?
A. Up to the summer of 1899.
Q. Now, you said that he said that he was going to live in New Jersey that fall; was that the fall subsequent to the summer, or the fall subsequent to the making of the codicil that he had in mind?
A. Subsequent to the summer.

Q. Did he vote, as a matter of fact, in Arlington that fall?
36 A. He was very nearly on his death bed at the time—he couldn't very well vote.

Q. This park association of which he was trustee; was that a public park or private park?

A. It was a private park association; that is, gotten up by several individuals, and they owned property there, and formed this park association—I don't know whether the association was incorporated or not.

Q. But it was known as that?

A. In fact, I am pretty sure it was incorporated, because the Board of Mt. Arlington has never repaired the roads of the park, and left it entirely to the association—I suppose they must have been incorporated—and it was necessary for them to go on with the taxes and repair their own roads—it was not private in that way.

Q. The association, so far as you know, has no other intent than having a beautiful park there?

A. To promote the place—to build it up.

Q. For the purpose of selling lots?

A. Not individually, no; I mean not as an association, because each member of the association—each trustee—had property, and, naturally, would be benefitted by any improvement in the property of the place.

Q. You said that after your father's return to New York, he was quite ill; from that time until about the time of his death. He was under morphine more or less all the time?

A. Yes, all the time.

Q. From November on?

A. Yes; in fact, from the middle of the summer on.

Q. So that he was under the physician's care?

A. Yes.

Q. Would he be under morphine all the 24 hours?

A. No.

Q. Simply at nights?

A. We would give him two injections a day.

Q. That is, morning and night?

A. Later on; nearer his death, he got more than that.

Q. How long prior to his death?

A. For six months prior to his death, he was given injections of morphine.

Q. For how often?

A. Once or twice a day.

37 Q. You said before his death they were more frequent?

A. Yes, sometimes 3 or 4 or 5.

Q. How long prior to his death did that become necessary?

A. I should say a month before his death; it depended entirely upon his condition—if he was suffering he would be given the injection—if he was not—

Closed.

Affidavit of Hamilton Wallis.

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

COUNTY OF NEW YORK, *ss:*

Hamilton Wallis, being duly sworn, says:

I am a resident and citizen of the State of New Jersey, and for upwards of twenty-five years last past I have been an attorney and counsellor at law of that State.

The General Statutes of New Jersey, published by authority of the legislature under acts of April 4, 1894, and March 20, 1895, contain the following provisions, re-enacted in Chapter 234 of Laws of 1898, and still in force:

SECTION 14, at p. 2358: "That the surrogates of the several counties of this state shall take depositions to wills, and admit the same to probate, and grant letters testamentary thereon; but in
38 case of doubts arising on the face of the will, or a caveat is put in against proving a will, or a dispute arises respecting the existence of a will, the surrogate shall not act in the premises, but shall issue citations to all persons concerned to appear in the orphans' court of the same county, which court shall hear and determine the matters in controversy."

SECTION 15, at p. 2359: "That the application for the probate of the will of any person who was a resident in this state at his decease, and for letters testamentary thereon, under the preceding section, shall be made to the surrogate of the county in which the testator resided at the time of his death."

SECTION 18, at p. 2359: "That letters testamentary issued by the surrogate on the probate of a will, shall be in the following form:

"I,....., surrogate of the county of....., do certify the annexed to be a true copy of the last will and testament of....., late of the county of....., deceased, and that ....., the executors therein named, proved the same before me, and are duly authorized to take upon themselves the administration of the estate of the testator, agreeably to the said will. Witness my hand and seal of office, the.....day of ....., in the year of our Lord one thousand eight hundred....."

The will and codicil of Albert Tilt were proved before the Surrogate of Morris County, New Jersey, as the county in which said testator resided at the time of his death, the petition for probate described him as late of the Township of Roxbury in said county, and the letters testamentary issued thereon, attached to copies of the will and codicil, read as follows:

"Morris County, Surrogate's Office, Morristown, N. J.

"I, David Young, Surrogate of said county, do certify the annexed to be a true copy of the last will and testament of Albert Tilt, late of the County of Morris, deceased, and that Adelaide V. Tilt,
39 Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran, the executors therein named, proved the same before me and are duly authorized to take upon themselves the administration of the estate of the testator, agreeable to the said will.

"Witness my hand and seal of office this 23rd day of May, in the year of our Lord, A. D., one thousand nine hundred.

"DAVID YOUNG, *Surrogate.*"

To this is affixed the Surrogate's Seal of the County of Morris, New Jersey.

In the probate of this last will and testament the Surrogate assumed jurisdiction on the ground that Albert Tilt was at the time of his death a resident of the State of New Jersey and of the County of Morris within that State. No other basis of jurisdiction appeared, and that basis of jurisdiction was shown and is recited in the letters testamentary in compliance with the requirement of the above statute.

Under the law of New Jersey the probate of a will by the Surrogate cannot be attacked collaterally.

In the case entitled "In the Matter of Abraham Coursen's Will," reported in 3 Green's Chancery Reports (N. J.), 408, it was held by the Chancellor, sitting by virtue of his office as Ordinary of the Prerogative Court, and speaking of the powers and jurisdiction of the surrogates: "Their acts were recognized as valid by the courts, and they came to be considered as lawful and competent judges of the matters submitted to their cognizance. And although they are unknown to the constitution, they have been frequently recognized by acts of the legislature." I receive the certified copy of the surrogate's proceedings as a verity. I am bound to respect his attestation under his official seal. In this court it has the effect of a record, against which I cannot admit counter averments. The proof which has been offered to impeach it, I cannot receive. Any error or irregularity in the proceedings of the surrogate, can come before me only by appeal."

40 In the case entitled "Straub's Case," reported in 49 New Jersey Equity Reports, 264, it was held by the Chancellor, sitting as Ordinary: "The surrogate's probate was a judicial act, and, as such, is conclusive until it shall be vacated, either through appeal, or by proceedings in direct attach upon it."

In the case entitled "Quidort's Administrator *v.* Pergeaux," reported in 3 C. E. Green, being 18 New Jersey Equity Reports, 472, it was held by the Chancellor: The granting administration is exclusively with the ordinary and his surrogates. The grant is a proceeding *in rem*, in the strict sense of that term. It constitutes the person to whom it is granted the administrator, whether rightly or wrongly granted; and it cannot be inquired into here collaterally. The act of the surrogate can only be reviewed by appeal to the Or-

phans' Court or Prerogative Court. Like the acts of all other regularly constituted tribunals, the acts of the surrogate cannot be impeached collaterally."

In the case entitled "Ryno's Executor *v.* Ryno's Administrator," reported in 12 C. E. Green, or 27 New Jersey Equity Reports, 522, it was held by the Court of Errors and Appeals: "All the books lay it down as a legal consequence of the exclusive jurisdiction of the ecclesiastical courts in granting probate and administration, that the sentence pronounced in the exercise of such exclusive jurisdiction should be conclusive evidence of the right determined. The probate of this will was granted immediately after the death of the wife, by the officer upon whom the law has conferred the exclusive power of granting probate and administration. It was a judicial act of a tribunal having competent authority, and is conclusive until repealed. So long as a probate remains unrevoked, the seal of the ordinary cannot be contradicted; neither can evidence be admitted to impeach it in a temporal court."

On May 24, 1900, an order was made by the Surrogate of said Morris County, New Jersey, limiting the time of creditors of the estate of said Albert Tilt to bring in their debts, demands or claims against the same; and on February 25, 1901, further order
41 was made by the same Surrogate declaring and determining that the time so limited had expired, and that all creditors who had then neglected so to bring in their claims and demands "be forever barred from their action therefor against the executors of said deceased," Albert Tilt. This order the said surrogate had, under the laws of New Jersey, full and competent jurisdiction to make. No claim of the State of New York against the estate of said Albert Tilt was presented to the said executors within the time so limited.

On or about February 23, 1901, a petition of Benjamin B. Tilt, as one of the said executors of said Albert Tilt, was presented to this Court, praying that said will and codicil, proofs and decree of probate and letters testamentary, authenticated copies of which were annexed to said petition, might be recorded in the office of the Surrogates of the County of New York, as provided by the laws of New York; and, thereupon, on or about February 26, 1901, an order was made and entered in this Court, reciting said petition and the copies of said papers thereto annexed, "from which it appears that the said Albert Tilt, at the time of his death, was a resident of the Township of Roxbury, Morris County, State of New Jersey; that real property situated in the County and State of New York is devised and made subject to a power of disposition by said will and codicil, which have been executed in conformity with the laws of this State, and have been admitted to probate by the Surrogate of Morris County, New Jersey, and recorded in his office as prescribed by the laws of that State," and granting the prayer of said petition and directing the recording of the aforesaid papers. Said papers were thereupon so recorded and are now part of the records of this Court.

Said executors accounted as such in the Orphans' Court of said

Morris County, New Jersey, which court had jurisdiction under the laws of New Jersey to entertain such accounting and to direct final distribution of the estate of said testator thereon, and such proceedings were thereupon had that on June 20, 1901, a decree was made in said Orphans' Court by the Judge presiding therein finally
42 settling and allowing the accounts of the said executors, and directing the distribution of the balance of the estate of said Albert Tilt remaining in the hands of said executors according to the terms of said will. Thereupon, and prior to August, 1901, such distribution was made by said executors pursuant to the terms of said will, in conformity with the direction of said decree, and thereafter there remained in the hands of the said executors no money or personal property whatsoever of the estate of said Albert Tilt.

Said executors have paid the inheritance or succession taxes and legacy taxes which were imposed upon the estate of said Albert Tilt under or by virtue of the laws of the State of New Jersey, and under and by virtue of the laws of the United States; the last named taxes having been paid to the Collector of Internal Revenue of the United States in New Jersey.

Mount Arlington, New Jersey, is embraced within the legal limits of the Township of Roxbury, in said County of Morris and State of New Jersey.

No claim of any liability of the estate of said Albert Tilt, or of his executors, to the payment of any transfer tax, succession tax, or legacy tax, under the laws of the State of New York was asserted or made known to said executors until after the final distribution of said estate had been made, as aforesaid, in conformity with the aforesaid decree of the Orphans' Court of Morris County, New Jersey.

HAMILTON WALLIS.

Sworn to before me this 24th day of March, 1905.

EDW. O. KANNOFSKY,
Notary Public, Kings Co.

Cert. Filed in N. Y. Co.

43 *Will and Codicil of Albert Tilt.*

Know all men by these presents, That I, Albert Tilt, of the Borough of Manhattan, in the City and State of New York, have made, published and declared, and do, by these presents, make, publish and declare my last will and testament, in manner and form following, that is to say:

First: I order and direct that all my just debts and liabilities, funeral and testamentary expenses, be first paid out of my estate.

Second: I give, devise and bequeath to my wife, Adelaide V. Tilt, the dwelling house wherein I now reside, and the lot whereon the same is erected, known as Number Five (5) East Sixty-seventh Street, in said Borough of Manhattan, together with the household furniture of every kind and description, and all my books, ornaments, pictures and all other personal property therein contained, and also my stable known as Number 40 West Sixty-sixth Street, in

said Borough, and all my horses, carriages, harness, robes, sleighs, and all stable appurtenances and equipments of every description therein contained, to have and to hold the above devised and bequeathed property to my said wife, her heirs and assigns, forever.

Third: I give and bequeath to the Paterson General Hospital located at Paterson, New Jersey, the sum of Twenty five hundred Dollars; to St. Joseph's Hospital of said Paterson the sum of Twenty-five hundred Dollars; and to the Paterson Orphan Asylum the sum of Twenty-five hundred Dollars; the above legacies to be payable either in cash or in the common stock of The Phœnix Silk Manufacturing Company, a corporation of the State of New Jersey, located and carrying on business at said City of Paterson, at par, at the election of my executors hereinafter named or the survivors or survivor of them or their successor or successors.

44 Fourth: I give and bequeath to James McGerigle, of the City of New York, the sum of Five hundred Dollars, in case he shall be in my employ at the time of my death.

Fifth: I give and bequeath to Albert Dowell of said City of Paterson the sum of Fifteen hundred Dollars; to Louis K. Tilt of Pottsville, in the State of Pennsylvania, the sum of Ten thousand Dollars; to John C. Dowell, of said Paterson, the sum of Ten thousand Dollars; to John R. Curran, of said Paterson, the sum of Ten thousand Dollars; to James W. Vert, of said Paterson, the sum of Twenty-five hundred Dollars; to Peter Collins, of said Paterson, the sum of Fifteen hundred Dollars; to Henry Van Winkle, of said Paterson, the sum of Fifteen hundred Dollars; and to William G. Grundy, of Boston, Massachusetts, the sum of One thousand Dollars; the above legacies to be payable either in cash or in the common stock at par of said The Phœnix Silk Manufacturing Company, at the election of my executors hereinafter named or the survivors or survivor of them, or their successor or successors.

Sixth: I give and bequeath to my said wife, Adelaide V. Tilt, Six hundred shares of the preferred stock of said The Phœnix Silk Manufacturing Company, or at the election of my said executors and the survivors or survivor of them, or their successor or successors, the sum of Thirty thousand Dollars in cash—that being the par value of said stock—in trust, nevertheless, for the following uses and trusts, namely:

1. In case said legacy shall be paid in money as above provided, to invest the same and keep the same invested in good interest bearing securities, and to receive and collect the interest or income to be derived therefrom.

2. In case said legacy shall be paid in stock as above provided, to receive and collect the dividends declared or paid thereon so long as the same shall remain unsold.

3. In the discretion of said trustee, to sell any or all of said
45 stock, to invest the moneys derived from such sales in good interest bearing securities, and to keep the same so invested and to receive and collect the interest or income to be derived therefrom.

4. To apply such interest, income and dividends in her discretion, in quarterly or other payments, to the support and maintenance of

Elizabeth Tilt, widow of the late William H. Tilt, of Roxbury, in the State of Massachusetts, and her children, and to the education of her children.

5. At the discretion of my said trustee, to divide and distribute the principal of said trust fund to and among the children of the said Elizabeth Tilt, and their descendants, after they shall severally attain the age of Twenty-one years, at such time, in such manner, and in such proportions as my said trustee shall see fit.

Seventh: I give and bequeath to my said wife, Adelaide V. Tilt, two hundred shares of the preferred stock of said The Phœnix Silk Manufacturing Company, or; at the election of my said executors and the survivors or survivor of them, or their successor or successors, the sum of Ten thousand Dollars in cash—that being the par value of said stock—in trust, nevertheless, for the following uses and trusts, namely:

1. In case said legacy shall be paid in money as above provided, to invest the same and keep the same invested in good interest bearing securities, and to receive and collect the interest or income to be derived therefrom.

2. In case said legacy shall be paid in stock as above provided, to receive and collect the dividends declared or paid thereon so long as the same shall remain unsold.

3. In the discretion of said Trustee, to sell any or all of said stock, to invest the moneys derived from such sales in good interest bearing securities, and to keep the same so invested and to receive and collect the interest or income to be derived therefrom.

46 4. To apply such interest, income and dividends in quarterly or other payments to the support, maintenance and education of the children of S—— Ivison, of Roxbury, in the State of Massachsetts, living at the time of my death.

5. As each of the said children of said Ivison attains the age of twenty-one years, to pay to such child such proportion of the principal of said trust fund as my said trustee shall deem best, continuing the application of the income from the remainder of said trust fund for the support and maintenance of the remaining children of said Ivison.

Eighth: All the rest, residue and remainder of my estate, of every nature and description, and wheresoever situate, I give, devise and bequeath to my executors hereinafter named and the survivors or survivor of them, and their successor or successors, in trust, for the following uses and trusts, namely:

1. To sell, convey and dispose of all the real estate of which I shall die seized or possessed, or to which I shall be entitled at the time of my death, except the house and lot and the stable and lot on which it stands, herein and hereby specifically devised to my wife, and the house and lot Number 137 West Seventy-first Street, in said Borough of Manhattan, and to convert the same into money, which I direct shall be done as soon after my decease as possible, without material injury to my estate.

2. To divide my said residuary estate into so many shares or portions as will provide one equal share or portion for my said wife and one equal share or portion for each of my children, or the law-

ful issue of deceased children, which I shall leave me surviving, the issue of a deceased child to count as one for the purposes of such division.

3. To pay over and distribute to my said wife, Adelaide V. Tilt, one of such equal shares or portions, and to pay over and distribute another of such equal shares or portions to each of my children, or their lawful issue, except my daughter, Addie Estelle Acer,
47 and her children, equally, share and share alike, *per stirpes* and not *per capita;* but in making such division I direct that the stock of said The Phœnix Silk Manufacturing Company held by me at the time of my death and not otherwise disposed of under the terms of this will, shall be divided between said shares in specie so far as such division can be actually made.

Ninth: The remaining share or portion of my residuary estate, including therein and as part thereof all sums of money which shall be charged upon my books against my said daughter, Addie Estelle Acer, at the time of my death, and also the house and lot known as Number 137 West Seventy-first Street, in said Borough of Manhattan, and all personal property therein contained, at valuation of Forty-five thousand Dollars, which shall be taken as the value of such house and lot and the contents thereof for the purposes of the division of my residuary estate into shares as hereinbefore provided, I direct my said executors and their survivors and successors to pay over, deliver and convey to The Fifth Avenue Trust Company of the City of New York, to be held by said Company and its successors, in trust, for the following uses and purposes, namely:

1. To permit my said daughter and her family to occupy and use said house and lot, and the personal property therein contained, so long as she shall desire to make the same her home.

2. Whenever my said daughter shall cease to reside in said house, to rent the same until sold as hereinafter provided.

3. After the death of my said daughter or, in her lifetime, with her consent,—to be expressed by her joining in the deed thereof,—at such time, in such manner, for such price, and upon such terms as my said Trustee or its successors shall elect, to sell and convey the said house and lot, and to make, execute and deliver all deeds or other instruments in writing necessary to vest in the purchaser thereof the title thereto, and to invest and keep invested the
48 proceeds thereof as hereinafter provided.

4. To retain in such share or portion so to be held in trust any investments made by me in my lifetime or in its discretion to sell the same and convert the same into money.

5. To invest the proceeds of the real and personal property included in said trust share, as and when the same shall be sold or otherwise converted into money, in first mortgages upon improved real estate in the City of New York, worth at least twice the amount of such investment.

6. To receive and collect the dividends, interest, rents, issues and profits of said share, and to pay the same to my said daughter personally upon her personal receipt during the term of her natural life, such payments to be made monthly on the first day of each

month of such income so collected or received during the preceding month.

7. Upon the death of my said daughter to divide said trust share into as many shares or portions as there shall be children of my said daughter or lawful issue of deceased children of hers then surviving, the issue of a deceased child to count as one for the purposes of such division.

8. To pay over one of such shares or portions to each of the children of my said daughter who shall then have attained the age of twenty-one years.

9. To pay over and distribute one of such shares or portions to and among the lawful issue of any child of my said daughter who shall have died before its mother, equally, share and share alike, *per stirpes* and not *per capita.*

10. To keep invested one of said shares for each of the minor children of my said daughter, and to apply the rents, profits, dividends, interest and income, so far as the same may be necessary, to the support, maintenance and education of such minor child during its minority, accumulating and reinvesting the surplus as hereinbefore provided.

49 11. As and when each of such minor children shall attain the age of twenty-one years, to pay to such child one of such shares or portions with all the accumulations thereof.

12. In case either of such minor children shall die before attaining the age of twenty-one years, to pay over and distribute the share or portion of the one so dying to and among the next of kin of such minor child of the blood of its mother, equally, share and share alike, *per stirpes* and not *per capita.*

Tenth: I nominate, constitute and appoint my said wife, Adelaide V. Tilt, to be guardian of the persons and estates of my minor children during their respective minorities.

Eleventh: I authorize and empower my executors, hereinafter named and the survivors and survivor of them, and the successor or successors of such survivor, in their discretion, in such manner, for such price, and upon such terms as they shall deem best, to sell and convey any or all of the real estate of which I shall die seized or possessed, or to which I shall be entitled at the time of my death, not herein otherwise disposed of, and to make, execute, and deliver and all deeds or other instruments necessary to vest the title thereto in the purchasers thereof.

Twelfth: The provisions herein made for my wife, Adelaide V. Tilt, are to be taken and accepted by her in lieu of her dower or other interest which she might by law have in my estate.

Thirteenth: I nominate, constitute and appoint my said wife, Adelaide V. Tilt, and my sons, Benjamin B. Tilt and Albert Tilt, Jr., to be executors of this my last will and testament, hereby revoking any and all other or former wills by me made, and I expressly direct that neither my said executors nor my wife, as trustee hereunder, shall be required to give any bond or other security for the faithful performance of their duties as such.

In witness whereof, I have hereunto set my hand and
50 affixed my seal this twenty-ninth day of May, in the year one thousand eight hundred and ninety-one.

ALBERT TILT. [SEAL.]

Signed, sealed, published and declared by the said Testator as and for his Last Will and Testament, in our presence, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

HAMILTON WALLIS,
East Orange, N. J.
GEORGE E. CONEY,
Orange, N. J.
ALFRED ROELKER, JR.,
202 *West* 45 *Street, New York City.*

I, Albert Tilt, formerly of the Borough of Manhattan, in the City and State of New York, now of the Borough of Mount Arlington, in the County of Morris and State of New Jersey, have made, published and declared, and do hereby make, publish and declare the following as and for a codicil to my Last Will and Testament, which bore date on the 29th day of May, in the year 1899;

First: In addition to the legacies therein contained, I give and bequeath to Mrs. Rush, forewoman in the Adelaide Silk Mill at Allentown, Pennsylvania, in recognition of her long and faithful service, the sum of Five hundred Dollars.

Second: I revoke the legacies contained in the sixth and seventh paragraphs of my said will, and in lieu thereof I give and bequeath to my said wife, Adelaide V. Tilt, Twenty five thousand Dollars, par value of the preferred stock of said The Phœnix Silk Manufacturing Company, or, at the election of my executors, and the survivors or survivor of them, and their successor or successors, the sum of Twenty-five thousand Dollars, in cash, in trust, nevertheless, for the following uses and trusts:

51 1. At any time that my said wife shall elect before the youngest of the beneficiaries hereinafter named living at the time of my death shall die or attain the age of twenty-one years, to pay over and distribute the said stock or the said money, as the case may be, to and among Elizabeth Tilt, widow of the late William H. Tilt, of Roxbury, in the State of Massachusetts, and her children, and to and among the children of S. Ivison, of Roxbury, in the State of Massachusetts, or such of them, including both families, as she shall elect, in such proportions and in such amounts as she shall elect to do; provided, however, that such payment and distribution must be made by my said wife and her successor in this trust whenever the youngest of said beneficiaries living at the time of my death shall die or attain the age of twenty-one years.

2. Until my said wife shall make distribution of said trust fund as hereinbefore provided, to invest the same or such part thereof as shall at any time remain unpaid and undistributed as aforesaid, and keep the same invested either in said preferred stock of the Phœnix

Silk Manufacturing Company, or in such other securities producing an income as to my said wife shall seem best, and to apply the dividends or income to be derived therefrom to the support and maintenance of the said Elizabeth Tilt and her children, and of the said children of the said S. Ivison, in such proportion and in such manner as my said wife or her successor in this trust shall deem best.

3. Upon the youngest of the said beneficiaries living at the time of my death dying or attaining the age of twenty-one years, to pay over and distribute the whole that shall then remain undistributed of said trust fund to and among the said Elizabeth Tilt and her children, and the said children of S. Ivison, in such proportions as to my said wife or her successor shall seem best.

Third: I revoke so much of the ninth paragraph of my said will as directs the money and property therein enumerated, to be
52 paid over, delivered and conveyed to the Fifth Avenue Trust Company of the City of New York, and in place thereof direct that the said property, at the time stated in said paragraph of my will, shall be made over, delivered and conveyed to the New Jersey Title Guarantee and Trust Company of Jersey City, in the State of New Jersey, to be taken and held by said Company, upon the trusts specified in said ninth paragraph of my said will.

Fourth: I revoke the appointment of my son, Albert Tilt, Jr., to be one of the executors of my said will, and in place of my said son I nominate, constitute and appoint my friend, Joseph W. Congdon of Paterson, in the State of New Jersey, and my friend, John R. Curran, of said Paterson, to be executors of my said will, in conjunction with the remaining executors therein named, and I expressly direct that neither of the executors hereby appointed shall be required to give any bond or other security for the faithful performance of their duties as such.

Fifth: As modified by this Codicil, I do republish and redeclare my said last will and testament.

In witness whereof, I have hereunto set my hand and seal this twenty-third day of February, in the year 1900.

ALBERT TILT. [SEAL.]

Signed, sealed, published and declared by the said testator as and for a Codicil to his last will and testament in our presence, who, at his request, in his presence, and in presence of each other, have hereunto subscribed our names as witnesses.

HAMILTON WALLIS,
East Orange, N. J.
AUGUST H. BEAULIEU,
326 *West 59th Street, New York City.*
ALFRED ROELKER, JR.,
202 *West* 45 *Street, New York City.*

53 *Order Fixing Time.*

At a Surrogate's Court, held in and for the County of New York at the County Court House in the City of New York, on the 15th day of June, 1903.

Present—Hon. Abner C. Thomas, Surrogate.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

Upon reading the report of the appraiser, Robert Mazet, Esq., filed herein on the 6" day of March, 1903, wherein it appears that said decedent died on the 2" day of May, 1900, and on motion of Edward H. Fallows, attorney for the State Comptroller,

It is ordered and adjudged

That the cash value of the property referred to in said report the transfer of which is subject to the tax imposed by the act in relation to taxable transfers of property and the tax to which the said transfers are liable is as follows:

Beneficiary.	Cash val. of int.	Tax assessed thereon.
Adelaide V. Tilt, widow	$203,890.24	$2,038.90
Paterson General Hospital, Paterson, N. J.	2,500.00	125.00
St. Joseph's Hospital, Paterson, N. J.	2,500.00	125.00
Paterson Orphan Asylum, Paterson, N. J.	2,500.00	125.00
James McGerigle, no relation	500.00	25.00
54 Albert Dowell, no relation	1,500.00	75.00
Louis K. Tilt, cousin	10,000.00	500.00
John C. Dowell, no relation	10,000.00	500.00
John P. Curran, no relation	10,000.00	500.00
James W. Vert, no relation	2,500.00	125.00
Peter Collins, no relation	1,500.00	75.00
Henry Van Winkle no relation	1,500.00	75.00
Mrs. Rush, no relation	500.00	25.00
William G. Grundy, no relation	1,000.00	50.00
Adelade V. Tilt, as trustee for the widow and children of William H. Tilt, deceased, and the children of S. Ivison none of whom is related to the testator	25,000.00	1,250.00
Benjamin B. Tilt, son	194,890.24	1,948.90
Albert Tilt, son	194,890.24	1,948.90
William A. Tilt, son	194,890.24	1,948.90
Addie Estelle Acer, daughter	1,534.00	15.34
New Jersey Title Guarantee & Trust Company of Jersey City: as Trustee for Addie Estelle Acer daughter	149,491.00	1,494.91
As trustee for Adelaide Acer and Charlotte Acer grandchildren	43,648.00	436.48

ABNER C. THOMAS, *Surrogate.*

55 *Appeal to Surrogate.*

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

Please take notice that Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, Executors of the last Will and Testament and Codicil of Albert Tilt, deceased, hereby appeal to the Surrogate from the appraisement, assessment and determination of the Transfer Tax in this proceeding, and from the order made and entered herein on the 15th day of June, 1903, upon the report of the appraiser filed herein on the 6th day of March, 1903, fixing, assessing and determining the said tax, and object thereto on the following grounds:

1. That the said Albert Tilt, deceased, at the time of his death, was a resident and citizen of the State of New Jersey, but the said tax has been assessed and imposed upon the transfer of his personal property, which was in the State of New Jersey at the time of his death and which was not subject to any transfer tax imposed by the laws of the State of New York.

2. That the said appraisement and the said order fixing the said tax were made without any authority or jurisdiction to appraise or to impose a tax upon the property of the testator in the State of
56 New Jersey or upon the transfer thereof by said last Will and Testament and Codicil.

3. That at the time when the said appraisement was made by the appraiser and the said tax was fixed by said order, the question of the residence of the testator at the time of his death had not, and has not since, been judicially determined, and the determination thereof by the appraiser and the fixing of said tax, so far as the same relates to the property of the testator in the State of New Jersey, or the transfer thereof, were made without jurisdiction or authority, and are void.

4. That as to the property of the testator which was in the State of New Jersey at the time of his death, the liability to taxation in this proceeding cannot be determined, until it has been judicially ascertained that the testator was a resident of the State of New York.

5. That the right to assess or impose a tax under the laws of the State of New York upon the transfer of the property of the testator, if there ever was any such right, was barred before the commencement of this proceeding, by a decree of the Orphans' Court of Morris County, New Jersey, a court of competent jurisdiction, made on the 25th day of February, 1901, barring all claims against the said testator or his estate which had not been presented and proved to said executors, pursuant to public notice theretofore given and published, as prescribed by the laws of the State of New Jersey; and by the further decree of the same Court, made on the 20th day of June, 1901, directing the distribution of the estate of said testator in the hands of

said executors, according to the terms of the will of the said Albert Tilt, deceased; in obedience to which the said executors without any notice or knowledge of any claim or liability for the payment of a transfer tax under the laws of the State of New York, distributed the said estate, so that there was not at the time of the commencement of this proceeding, and is not now, any property of the said
57 estate in the hands of said executors.

Dated, August 10th, 1903.

WILSON & WALLIS,
Attorneys for Executors.

Office & Post Office Address, 48 Wall Street, New York.

To Edward H. Fallows, Esq., Attorney for the Comptroller of the State of New York. J. Fairfax McLaughlin, Esq., Clerk of the Surrogate's Court, County of New York.

Stipulation.

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

It is hereby stipulated that the question presented by motion of the executors of Albert Tilt, which came before the Surrogate on March 3, 1905, namely, whether or not said Albert Tilt was a resident of the State of New York at the time of his death, within the meaning of the Tax Law of the State of New York, be submitted on March 24, 1905, to such Surrogate for determination by him, upon the affidavits and depositions attached to the report of Robert Mazet, as appraiser herein, now on file in the office of the clerk of this
58 Court, and such further affidavits as the respective parties may be advised to present.

Dated New York, March 10, 1905.

WILSON & WALLIS,
Attorneys for Executors.
EDWARD H. FALLOWS,
Attorney for State Compt.

Stipulation.

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

It is hereby stipulated and agreed that the time for submission of this matter to the Surrogate as fixed by former stipulation is extended to Tuesday, March 28, 1905, and that it be then submitted to the Surrogate upon the proofs which were filed in the office of

the Clerk of this Court on the coming in of the report of Robert Mazet, Appraiser, and upon the affidavit of Hamilton Wallis.

And it is further stipulated that the contents of the record of the proceedings upon the probate of the will of Albert Tilt before the Surrogate of Morris County, New Jersey, of the accounting of the executors of Albert Tilt in the Orphans' Court of said Morris County, New Jersey, and of the decree of said Court thereon, are, so far as material to the matter thus submitted, sufficiently shown in
59 the said affidavit of Hamilton Wallis.

Dated New York, March 23, 1905.

WILSON & WALLIS,
Attorneys for Executors.
EDWARD H. FALLOWS,
Att'y for State Compt.

The foregoing case contains all the evidence taken in this proceeding.

Opinion of Surrogate.

Estate of Albert Tilt.—On the evidence submitted I will determine as a fact that the decedent was at the time of his death a resident of New York County.

60 *Findings of Fact and Conclusions of Law.*

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

Upon the motion of the Executors of the Last Will and Testament of Albert Tilt, deceased, to vacate and set aside the order of June 15, 1903, fixing the tax on said estate as made without jurisdiction, or that further proceedings be stayed until it should be judicially determined whether or not said Albert Tilt was a resident of the State of New York at the time of his death within the meaning of the Tax Law of New York, and upon the submission of that question for determination under the stipulation of the parties, I do hereby make the following findings of fact and conclusions of law.

Finding of Fact.

That at the time of the death of said Albert Tilt, on May 2nd, 1900, his legal residence was in this City, County and State of New York.

Conclusion of Law.

That the personal estate wherever situated of said Albert Tilt, at the time of his death, is subject to the payment of the transfer tax

under the provisions of Article X of Chapter 908 of the Laws
61 of 1896, and the acts amendatory thereof and supplemental thereto.

Let an order and decree be entered accordingly.

Dated, May 5th, 1905.

ABNER C. THOMAS, *Surrogate.*

Executors' Requests to Find.

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

Upon the motion of the Executors of the Last Will and Testament of Albert Tilt, deceased, to vacate and set aside the order of June 15, 1903, fixing the tax on said estate as made without jurisdiction, or that further proceedings be stayed until it should be judicially determined whether or not said Albert Tilt was a resident of the State of New York at the time of his death within the meaning of the Tax Law of New York, and upon the submission of that question for determination under the stipulation of the parties, I do hereby make the following findings of fact and conclusions of law.

Findings of Fact.

62 1. Albert Tilt, the testator, resided at Paterson, New Jersey, until the year 1888, when he removed to New York City.

2. Said Albert Tilt was for twenty-two years next preceding his death the president of the Phœnix Silk Manufacturing Company, which had its factories at Paterson, New Jersey. In this company he held stock of the par value of $985,500. This was his principal business interest.

3. In the year 1889 said Albert Tilt owned two places of residence. One of these was the house known as No. 5 East 67th Street, in New York City, and the other was a house at Mount Arlington, in the Township of Roxbury, in Morris County, New Jersey. Each of these residences was occupied by said Albert Tilt and his family for about one-half of each year, the New Jersey house in the summer and the New York house in the winter. The house at Mount Arlington was kept open, during the whole of each year, ready for occupation, with servants in attendance, and was frequently occupied by the family of the testator during the winter months. And this condition continued from the year 1889 until said testator's death on May 2, 1900.

4. Said Albert Tilt made his last will and testament on May 29, 1899, in which he described himself as of the City of New York. In this will he appointed his wife, Adelaide V. Tilt, and his sons, Benjamin B. Tilt and Albert Tilt, Junior, his executors, and constituted The Fifth Avenue Trust Company of the City of New York the

trustee of a certain trust thereby created for the benefit of his daughter, Addie Estelle Acer, all remaining trusts created by his said will being confided to his executors aforesaid.

5. In the summer of the year 1899 the said Albert Tilt declared to his son, Benjamin Tilt, and to Joseph W. Congdon that he intended to change his legal residence to New Jersey and to make that his permanent residence.

6. Subsequently said Albert Tilt declared to the same persons and also to Hamilton Wallis, who had drawn his said will,
63 that he had changed his residence from New York to New Jersey, and that he proposed to change his will so as to express the fact of that change.

7. Said Albert Tilt on February 23, 1900, made a codicil to said last will and testament. In this codicil he describes himself as formerly of New York and now of New Jersey. In this codicil he revokes the appointment of his said son, Albert Tilt, Junior, as one of his executors, and substitutes said Joseph W. Congdon and John R. Curran, both of Paterson, New Jersey, as executors in place of said Albert Tilt, Junior. And in this codicil he revokes the appointment of The Fifth Avenue Trust Company of New York City as trustee of the trust for the benefit of his daughter, Addie Estelle Acer, and substitutes as trustee of the same trust the New Jersey Title Guarantee & Trust Company, a New Jersey corporation.

8. Said Albert Tilt, in his lifetime, removed the securities belonging to him from the State of New York to the State of New Jersey, and at the time of his death they were in the State of New Jersey and there came into the possession of his executors.

9. Said last will and testament of said Albert Tilt, and said codicil thereto, were presented to the Surrogate of Morris County for probate as the will of a resident of New Jersey and of said County, and were by said Surrogate admitted to probate on May 23, 1900, and letters testamentary thereon were issued by said Surrogate to said Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran.

10. On May 24, 1900, an order was made by said Surrogate of Morris County, New Jersey, limiting the time for creditors of the estate of said Albert Tilt to bring in their debts, demands, and claims against the same. And on February 25, 1901, a further order was made by the said Surrogate to the effect that the time so lim-
64 ited had expired, and that all creditors who had then neglected so to bring in their claims and demands be forever barred from their action therefor against the executors of said Albert Tilt.

11. On February 26, 1901, an order was made by this Court, directing the recording in this Court of said will, codicil, probate, and letters testamentary upon the estate of said Albert Tilt as a resident of the State of New Jersey at the time of his death.

12. Said executors of said Albert Tilt, named in said codicil, accounted as such executors in the Orphans' Court of said Morris County, New Jersey, said Court having jurisdiction of such accounting under the laws of New Jersey, and on June 20, 1901, a decree was made by said Court upon said accounting passing the accounts

of said executors and directing final distribution of the personal estate of said Albert Tilt in their hands.

13. Said executors made such distribution in obedience to said decree of said Orphans' Court, and thereafter there remained in their hands none of the personal estate of said Albert Tilt. And such distribution was so made prior to the institution of any proceedings herein.

14. It is the law of New Jersey that probate of the will of a resident of that State must be made before the Surrogate of the County in which the testator resided at the time of his death, and that the place of residence of such testator shall be specified in the letters testamentary granted upon the probate thereof.

15. Under the law of New Jersey the jurisdiction of the Surrogate of Morris County, New Jersey, was exercised in the probate of the will and codicil of said Albert Tilt upon the finding by said Surrogate that said Albert Tilt was a resident of said Morris County at the time of his death.

65 16. It is the law of New Jersey that the probate of a will before the Surrogate of a County of that State is conclusive until it shall be vacated either through appeal or by proceedings in direct attack upon it, and that it cannot be attacked collaterally.

Conclusions of Law.

1. The said testator, Albert Tilt, was a resident of the State of New Jersey at the time of his death.

2. Under the Constitution of the United States full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the State of New Jersey, and to the accounting and distribution made by his executors under the decree of the Orphans' Court of Morris County in said State, of the estate of said Albert Tilt as a resident of New Jersey at the time of his death.

3. None of the personal estate of said Albert Tilt is subject to the payment of a transfer tax under the laws of the State of New York, excepting only such of his personal estate as was actually within the State of New York at the time of his death.

Let an order and decree be entered accordingly.

Dated April, 1905.

(Endorsed by Surrogate:)

Each of the foregoing requests is refused. The requests for findings of fact, numbers 1 to 8 inclusive, in so far as they are accurate, concern matters of evidence merely and not issuable facts. The other requests for findings of fact concern acts and declarations of persons other than the decedent subsequent to his death, and are not material to the question of his residence at the time of his death.

Dated May 17, 1905.

ABNER C. THOMAS, *Surrogate.*

66 *Order.*

At a Surrogate's Court, held in and for the County of New York, at the County Court House in the City of New York on the 5 day of May, 1905.

Present: Hon. Abner C. Thomas, Surrogate.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran, executors of the last will and testament of Albert Tilt, deceased, having appealed to the Surrogate from the appraisement, assessment, and determination of the transfer tax in this proceedings, and from the order made and entered herein on the 15th day of June, 1903, upon the report of the appraiser, filed herein on the 6th day of March, 1903, fixing, assessing, and determining the said tax; and said executors having thereupon moved this Court that said order of June 15, 1903, be vacated and set aside as made without jurisdiction, or that further proceedings be stayed until it should be judicially determined whether or not said Albert Tilt was a resident of the State of New York at the time of his death within the meaning of the Tax Law of New York; and said motion and said appeal coming on together to be heard, and the respective parties having thereupon stipulated that said question as to the residence of said Albert Tilt should be submitted to the Surrogate for determination by him upon the affidavits and depositions attached to said report of the appraiser, and upon the affidavit of Hamilton
67 Wallis, verified March 24, 1905, and, the said Surrogate having upon such submission made his findings determining that said Albert Tilt was at the time of his death a resident of the State of New York and that his personal estate wherever situated is subject to the payment of a transfer tax; now, after hearing Messrs. Wilson & Wallis, attorneys for said executors, and George M. Judd, Esq., of counsel for the Comptroller of the State of New York, respondent, and on motion of Edward H. Fallows, Esq., attorney for the Comptroller of the State of New York, it is

Ordered and adjudged that said order of June 15th, 1903, so appealed from, be and the same hereby is in all respects affirmed.

ABNER C. THOMAS, *Surrogate.*

Order Resettling Order of May 5th, 1905.

At a Surrogate's Court, held in and for the County of New York, at the County Court House, in the City of New York, on the 17th day of May, 1905;

Present—Hon. Abner C. Thomas, Surrogate.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

An order having been made and entered herein on the 5th day of May, 1905, upon the motion of the executors of said Albert Tilt and their appeal from the order fixing a tax herein, and said executors having moved for a resettlement of said order;

68 Now, on reading and filing the notice of such motion and proof of due service thereof, and on motion of Wilson & Wallis, attorneys for said executors, no one appearing in opposition thereto,

It is hereby ordered that the said motion be and hereby is granted, and that said order of May 5, 1905, be and the same hereby is resettled and amended so as to read as follows:

Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran, executors of the last will and testament of Albert Tilt, deceased, having appealed to the Surrogate from the appraisement, assessment, and determination of the transfer tax in this proceeding, and from an order made and entered herein on the 15th day of June, 1903, upon the report of the appraiser, filed herein on the 6th day of March, 1903, fixing, assessing, and determining the said tax; and said executors having thereupon moved this Court that said order of June 15, 1903, be vacated and set aside as made without jurisdiction, or that further proceedings be stayed until it should be judicially determined whether or not said Albert Tilt was a resident of the State of New York at the time of his death within the meaning of the Tax Law of New York; and said motion and said appeal coming on together to be heard, and the respective parties having thereupon stipulated that said question as to the residence of said Albert Tilt should be submitted to the Surrogate for determination by him upon the affidavits and depositions attached to said report of the appraiser, and upon the affidavit of Hamilton Wallis, verified March 24, 1905, and the said Surrogate having, upon such submission, made his findings determining that said Albert Tilt was at the time of his death a resident of the State of New York, and that his personal estate, wherever situated, is subject to the payment of a transfer tax; now, after hearing Messrs. Wilson & Wallis, attorneys for said executors, and George M. Judd, Esq., of counsel for the Comptroller of the State of New York, respondent, and on

69 motion of Edward H. Fallows, Esq., attorney for the Comptroller of the State of New York, it is

Ordered and adjudged that the legal residence of said Albert Tilt was within the State of New York at the time of his death; and that said personal estate of said Albert Tilt, wherever situated, is subject

to the payment of a transfer tax under the Tax Law of the State of New York; and it is further

Ordered and adjudged that said order of June 15, 1903, so appealed from, be and the same hereby is affirmed.

ABNER C. THOMAS, *Surrogate.*

Exceptions.

Surrogates' Court, New York County.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran, Executors of the Last Will and Testament of Albert Tilt, deceased, hereby except to the Findings of Hon. Abner C. Thomas, Surrogate, filed herein on the 5th day of May, 1905, as follows:

1. To the finding of fact that at the time of the death of the said Albert Tilt, on May 2, 1900, his legal residence was in the City, County, and State of New York.

70 2. To the conclusion of law that the personal estate wherever situated, of said Albert Tilt, at the time of his death, is subject to the payment of the transfer tax under the provisions of Article X of Chapter 908 of the Laws of 1896, and the acts amendatory thereof and supplemental thereto.

3. To the refusal of the said Surrogate to find that Albert Tilt, the testator, resided at Paterson, New Jersey, until the year 1888, when he removed to New York City.

4. To the refusal of the said Surrogate to find that said Albert Tilt was for twenty-two years next preceding his death the president of the Phœnix Silk Manufacturing Company, which had its factories at Paterson, New Jersey. In this company he held stock of the par value of $985,700. This was his principal business interest.

5. To the refusal of the said Surrogate to find that in the year 1889 said Albert Tilt owned two places of residence. One of these was the house known as No. 5 East 67th Street, in New York City, and the other was a house at Mount Arlington, in the Township of Roxbury, in Morris County, New Jersey. Each of these residences was occupied by said Albert Tilt and his family for about one-half of each year, the New Jersey house in the summer and the New York house in the winter. The house at Mount Arlington was kept open, during the whole of each year, ready for occupation, with servants in attendance, and was frequently occupied by the family of the testator during the winter months. And this condition continued from the year 1889 until said testator's death on May 2, 1900.

6. To the refusal of the said Surrogate to find that said Albert Tilt made his last will and testament on May 29, 1899, in which he described himself as of the City of New York. In this

71 will he appointed his wife, Adelaide V. Tilt, and his sons, Benjamin B. Tilt and Albert Tilt, Junior, his executors, and

constituted The Fifth Avenue Trust Company of the City of New York the trustee of a certain trust thereby created for the benefit of his daughter Addie Estelle Acer, all remaining trusts created by his said will being confided to his executors aforesaid.

7. To the refusal of the said Surrogate to find that in the summer of the year 1899, the said Albert Tilt declared to his son, Benjamin Tilt, and to Joseph W. Congdon that he intended to change his legal residence to New Jersey and to make that his permanent residence.

8. To the refusal of the said Surrogate to find that subsequently said Albert Tilt declared to the same persons and also to Hamilton Wallis, who had drawn his said will, that he had changed his residence from New York to New Jersey, and that he proposed to change his will so as to express the fact of that change.

9. To the refusal of the said Surrogate to find that said Albert Tilt on February 23, 1900, made a codicil to said last will and testament. In this codicil he describes himself as formerly of New York and now of New Jersey. In this codicil he revokes the appointment of his said son, Albert Tilt, Junior, as one of his executors, and substitutes said Joseph W. Congdon and John R. Curran, both of Paterson, New Jersey, as executors in place of said Albert Tilt, Junior. And in this codicil he revokes the appointment of The Fifth Avenue Trust Company of New York City as trustee of the trust for the benefit of his daughter, Addie Estelle Acer, and substitutes as trustee of the same trust the New Jersey Title Guarantee & Trust Company, a New Jersey corporation.

10. To the refusal of the said Surrogate to find that said Albert Tilt, in his lifetime, removed the securities belonging to him from the State of New York to the State of New Jersey, and at the time
72 of his death they were in the State of New Jersey and there came into the possession of his executors.

11. To the refusal of the said Surrogate to find that said last will and testament of said Albert Tilt, and said codicil thereto, were presented to the Surrogate of Morris County for probate as the will of a resident of New Jersey and of said County, and were by said Surrogate admitted to probate on May 23, 1900, and letters testamentary thereon were issued by said Surrogate to said Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran.

12. To the refusal of said Surrogate to find that on May 24, 1900, an order was made by said Surrogate of Morris County, New Jersey, limiting the time for creditors of the estate of said Albert Tilt to bring in their debts, demands, and claims against the same. And on February 25, 1901, a further order was made by the said Surrogate to the effect that the time so limited had expired, and that all creditors who had then neglected so to bring in their claims and demands be forever barred from their action therefor against the executors of said Albert Tilt.

13. To the refusal of the said Surrogate to find that on February 26, 1901, an order was made by this Court, directing the recording in this Court of said will, codicil, probate and letters testamentary upon the estate of said Albert Tilt as a resident of the State of New Jersey at the time of his death.

14. To the refusal of the said Surrogate to find that said executors of said Albert Tilt, named in said codicil, accounted as such executors in the Orphans' Court of said Morris County, New Jersey, said Court having jurisdiction of such accounting under the laws of New Jersey, and on June 20, 1901, a decree was made by said Court upon said accounting passing the accounts of said executors and directing final distribution of the personal estate of said Albert Tilt in their hands.

73

15. To the refusal of the said Surrogate to find that said executors made such distribution in obedience to said decree of said Orphans' Court, and thereafter there remained in their hands none of the personal estate of said Albert Tilt. And such distribution was so made prior to the institution of any proceedings herein.

16. To the refusal of the said Surrogate to find that it is the law of New Jersey that probate of the will of a resident of that State must be made before the Surrogate of the County in which the testator resided at the time of his death, and that the place of residence of such testator shall be specified in the letters testamentary granted upon the probate thereof.

17. To the refusal of the said Surrogate to find that under the law of New Jersey the jurisdiction of the Surrogate of Morris County, New Jersey, was exercised in the probate of the will and codicil of said Albert Tilt upon the findings by said Surrogate that said Albert Tilt was a resident of said Morris County at the time of his death.

18. To the refusal of the said Surrogate to find that it is the law of New Jersey that the probate of a will before the Surrogate of a County of that State is conclusive until it shall be vacated either through appeal or by proceedings in direct attack upon it, and that it cannot be attacked collaterally.

19. To the refusal of the said Surrogate to find as a Conclusion of Law that the said testator, Albert Tilt, was a resident of the State of New Jersey at the time of his death.

20. To the refusal of the said Surrogate to find as a Conclusion of Law that under the Constitution of the United States full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the State of New Jersey, and to the accounting and distribution made by his executors under the decree of the Orphans' Court of Morris County in said State, of the estate of said Albert Tilt as a resident of New Jersey at the time of his death.

74

21. To the refusal of the said Surrogate to find as a Conclusion of Law that none of the personal estate of said Albert Tilt is subject to the payment of a transfer tax under the laws of the State of New York, excepting only such of his personal estate as was actually within the State of New York at the time of his death.

Dated New York, May 19th, 1905.

WILSON & WALLIS,
Attorneys for Executors,
48 *Wall Street, New York City.*

Stipulation Settling Case.

Surrogates' Court, New York County.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

It is hereby stipulated that the foregoing case contains all the evidence and other proceedings upon the trial of this proceeding,
75 and it is hereby consented that the same may be settled without notice and ordered to be filed.

Dated May 31, 1905.

EDWARD H. FALLOWS,
Attorney for State Comptroller.
WILSON & WALLIS,
Attorneys for Executors.

The foregoing case is hereby settled and ordered on file.

ABNER C. THOMAS, *Surrogate.*

Stipulation Waiving Certification.

Surrogates' Court, New York County.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

It is hereby stipulated and consented that the foregoing printed papers are copies of the order appealed from, notice of appeal
76 and case and exceptions on file in the Surrogates' Office, New York County, in this proceeding, and certification thereof is hereby expressly waived, pursuant to Section 3301 of the Code of Civil Procedure.

Dated May 31, 1905.

EDWARD H. FALLOWS,
Attorney for State Comptroller.
WILSON & WALLIS,
Attorneys for Executors.

Order Filing Record in Appellate Division.

Surrogates' Court, New York County.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

Pursuant to Section 1353 of the Code of Civil Procedure, it is Ordered, that the foregoing printed record be filed in the office of

the Clerk of the Appellate Division of the Supreme Court in the First Department.

Dated N. Y., June 5, 1905.

ABNER C. THOMAS, *Surrogate.*

77 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court in and for the First Department, held at the Appellate Division Court House in the County of New York, on the 7th day of July, 1905.

Present—Hon. Morgan J. O'Brien, P. J., Hon. Edward Patterson, Hon. George L. Ingraham, Hon. Chester B. McLaughlin, Hon. Edward W. Hatch, JJ.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

An appeal having been taken by Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as executors of the last will and testament of Albert Tilt, deceased, to the Appellate Division of the Supreme Court of the State of New York, in and for the first Judicial department, from an order of Hon. Abner C. Thomas, one of the Surrogates of the County of New York, made and entered herein on the 5th day of May, 1905, as resettled and amended by the order entered herein on the 17th day of May, 1905, affirming the order theretofore made and entered herein on the 15th day of June, 1903, fixing a tax, under the act relating to taxable transfers of property, upon the personal property, wherever
78 situated, of said decedent as that of a legal resident of the State of New York at the time of his death.

And said appeal having come on to be heard before this Court, after hearing William G. Wilson, Esq., of counsel for the appellants, and George M. Judd, Esq., of counsel for the respondent, and due deliberation having been had;

Now on motion of Edward H. Fallows, attorney for the State Comptroller, respondent, it is

Ordered and adjudged that the order appealed from be and the same is affirmed with costs to the said respondent against said appellants.

Notice of Appeal to Court of Appeals.

Surrogate's Court, New York County.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

Notice of Appeal.

Take notice that Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as executors of the last will and testament of Albert Tilt, deceased, hereby appeal to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, in this proceeding entered in the office of the Clerk of said Court, on July 22d, 1905, a certified copy of which was filed in the Surrogate's office, New York County, on the 24th day of July, 1905, and from
79 each and every part of said order.

Dated August 4th, 1905.

Yours, &c.,

WILSON & WALLIS,
Attorneys for Executors and Appellants.

To Edward H. Fallows, Esq., Attorney for State Comptroller and Respondent and James A. Donnelly, Esq., Clerk.

Stipulation Waiving Certification.

Surrogate's Court, New York County.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

It is hereby stipulated that the foregoing papers are true copies of the papers on appeal on which the order of affirmance by the Appellate Division was founded, the order of affirmance and the notice of appeal, on file in the Surrogate's Office, New York County, and certification thereof is hereby expressly waived pursuant to Section 3301 of the Code of Civil Procedure.

Dated August 9th, 1905.

WILSON & WALLIS,
Attorneys for Executors-Appellants.
EDWARD H. FALLOWS,
Attorney for State Comptroller-Respondent.

80 Surrogate's Court, New York County.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

STATE OF NEW YORK, *County of New York, ss:*

Myron T. Townsend being duly sworn, says that he is a member of the firm of Wilson & Wallis, attorneys for the executors-appellants

in the above entitled proceeding; that the Appellate Division of the Supreme Court, First Department, in affirming the order of the Surrogate herein did not hand down any opinion.

MYRON T. TOWNSEND.

Sworn to before me this 17th day of August, 1905.

EDW. O. KANNOFSKY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

81 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 17th day of October, in the year of Our Lord, one thousand nine hundred and five before the Judges of said Court.

Witness, The Hon. Edgar M. Cullen, Chief Judge Presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur Oct. 18th, 1905.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

Be it remembered that on the 10th day of August, in the year of our Lord, One thousand nine hundred and five Adelaide V. Tilt & o'rs, as Executors, etc., the appellants in the proceeding came into the Court of Appeals by Wilson & Wallis, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the First Judicial Department, And the State Comptroller the respondent in said proceeding afterward appeared in said Court of Appeals by Edward H. Fallows, his attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals, having heard this cause argued by Mr. William G. Wilson, of counsel for the appellant and the same having been submitted on behalf of counsel for the respondent, and after due deliberation had thereon, did order
82 and adjudge that the Order of the Appellate Division of the Supreme Court, appealed from herein, be, and the same hereby is, affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the Surrogate Court of the County of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And thereupon, as well the Notice of Appeal and return thereto aforesaid, as the judgment of the Court of Appeals aforesaid, by them

given in the premises, are by the said Court of Appeals remitted into the Surrogate's Court of the County of New York, before the Surrogates thereof, according to the form of the Statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court before the Surrogates thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *October 18th*, 1905.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said proceeding in the Court of Appeals, with the papers originally filed therein attached thereto.

W. H. SHANKLAND, *Clerk.*

83 At a Surrogate's Court, held in and for the County of New York, at the County Court House in the Borough of Manhattan, City of New York, on the 7th day of December, 1905.

Present: Hon. Frank L. Fitzgerald, Surrogate.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

An order in this proceeding having been entered in this Court on the 5th day of May, 1905, affirming an order of the same Court entered herein on the 15th day of June, 1903, assessing a transfer tax in respect to the property of the above named decedent;

And an appeal having been made to the Appellate Division, on the 19th day of May, 1905, and an order having been duly entered in the office of the clerk of said Court on the 7th day of July, 1905, affirming the order of the Surrogate's Court appealed from;

And an appeal having been taken from said last mentioned order by the appellants herein to the Court of Appeals on the 4th day of August, 1905, and said order of the Appellate Division having been affirmed, and a remittitur having been sent down from said Court, and filed in this Court on the 20th day of October, 1905,

Now, on reading said remittitur from the Court of Appeals, and on motion of Edward H. Fallows, attorney for the State Comptroller, respondent herein, it is

84 Ordered and adjudged that the order and judgment of the said Court of Appeals be and the same hereby is made the order and judgment of this Court and it is further

Ordered and adjudged that the respondent herein recover from the appellants herein, the sum of Two hundred Thirty-eight and 40/100 Dollars, the amount of his costs and disbursements as taxed in this proceeding and that said respondent have execution therefor.

FRANK T. FITZGERALD, *Surrogate.*

Settlement of the foregoing order is hereby waived.
Dated Dec. 6, 1905.

WILSON & WALLIS,
Att'ys for Executors.

85 Surrogate's Court, County and State of New York.

In the Matter of the Transfer Tax on the Estate of ALBERT TILT, Deceased.

Petition for Writ of Error.

Come now Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as executors of the last will and testament and codicil of Albert Tilt, deceased, by their attorneys, and complain that in the above entitled cause in the Court of Appeals of the State of New York, which is the highest court of law or equity in said State, wherein a decision could be had, and which has remitted the record and proceedings in said court to the Surrogate's Court of the County and State of New York, there to be proceeded upon according to law, and also in the rendition of the judgment or decree in the above entitled cause in said Surrogate's Court for the County of New York, on the 7th day of November, 1905, wherein was drawn in question the validity of a statute of said State and of an authority exercised thereunder on the ground of this being repugnant to the Constitution or laws of the United States, in that it was in violation of Section 2 of Article IV of the Constitution of the United States which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States, and the decision was in favor of such their validity,

86 and wherein a title, right, privilege or immunity was claimed by said executors under the Constitution of the United States, that is, under Section 1 of Article IV of said Constitution which provides that full faith and credit shall be given in each State to the public Acts, Records and judicial proceedings of every other State, and the decision was against the title, right, privilege or immunity so specially set up or claimed under the said Constitution, manifest error hath happened to the great damage of the said Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as executors as aforesaid.

Whereupon the said Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as such executors, pray for the reversal of said judgment or decree, and for the allowance of a writ of error, and for such other orders and process as may cause such error to be corrected by the Supreme Court of the United States.

Dated this 22nd day of December, 1905.

ADELAIDE V. TILT,
BENJAMIN B. TILT,
JOSEPH W. CONGDON, AND
JOHN R. CURRAN,
As Executors, etc., of Albert Tilt, Deceased,
By WILSON & WALLIS,
Their Attorneys.

Allowed December —, 1905.

——— ———,
Associate Justice of the Supreme Court of the United States.

87 [Endorsed:] Surrogate's Court, County of New York. In the Matter of the Transfer Tax upon the Estate of Albert Tilt, Deceased. Petition for Writ of Error. Wilson & Wallis, Attorneys for Executors, 48 Wall Street, New York. To —— ——, Attorney for —. Rec'd on Application, Dec. 23, 1905. R. W. Peckham, Asso. Jus. Sup. Ct. U. S.

88 New York Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of ALBERT TILT, Deceased.

Assignment of Errors.

Afterwards, to wit, on the 29th day of December, 1905, before the Justices of the Supreme Court of the United States, come the said Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, Executors of the last Will and Testament and Codicil of Albert Tilt, deceased, by Wilson & Willis, their attorneys, and say that in the record and proceedings aforesaid, and also in giving and ordering the final judgment of said Surrogate's Court under the directions of the Court of Appeals of the State of New York, there is manifest error in the rulings and decisions of said Surrogate of the County of New York and in the affirmance of the same, as also in other respects and particulars, and especially in this, to wit:

First. That inasmuch as in conformity with the Statutes of the State of New Jersey, the will of said Albert Tilt, the decedent, was established and admitted to probate by the Surrogate of Morris County, New Jersey, a court of competent jurisdiction, as the will of a resident of New Jersey, and said will was never offered for probate or admitted to probate in any Court or tribunal of the State of New York, and said executors derived their authority wholly from such probate and the issue of letters testamentary to them by said
89 Surrogate of Morris County, New Jersey, and not otherwise, such action of such Court of the State of New Jersey, which has never been vacated, reversed or set aside in that State, is conclusive upon the question of the residence of the decedent, upon all parties having any interest in his estate. And that the aforesaid determination and decision herein that said Albert Tilt was, at the time of his death, a resident of the State of New York is a denial of the full faith and credit which is secured to the Statutes and the judicial proceedings and determinations of the Courts of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors as citizens of New Jersey in their several individual and official capacities, in said State of New York; all as secured to them under the provisions of Sections 1 and 2 of Article IV of the Constitution of the United States.

Second. That, inasmuch as, in compliance with the Statutes of New Jersey, notice was duly given to all persons having any claim against the estate of said decedent, and no claim on behalf of the

State of New York was ever presented thereunder, and an order was duly made thereafter, barring all claims against the said executors thereunder, and said executors were appointed and qualified solely in the State of New Jersey, the aforesaid determination and decision that the estate of the said Albert Tilt within the State of New Jersey was subject to a transfer tax under the laws of the State of New York is a denial of the full faith and credit which is secured to the Statutes, and the judicial proceedings and determinations of the Courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors as citizens of New Jersey in their several individual and official capacities in said State of New York; all as secured
90 to them under the provisions of Sections 1 and 2 of Article IV of the Constitution of the United States.

Third. That, inasmuch as the right to bequeath and dispose of property by last will and testament is derived solely from provisions of positive law, and the taxing of the right of succession through such last will and testament is dependent upon the right so conferred by provisions of positive law, and as the last will and testament of said decedent derives its sole force and effect as to his personal estate which was within the State of New Jersey, from the laws of that State and from its establishment as his last will and testament through probate in the proper Court of that State, and said executors were appointed and qualified solely in the State of New Jersey, the aforesaid determination and decision that the personal estate of said decedent in the State of New Jersey is subject to a transfer tax under the laws of the State of New York is a denial of the full faith and credit which is secured to the Statutes, and the judicial proceedings and determinations of the Courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the testator and said executors as citizens of New Jersey in their several individual and official capacities in said State of New York; all as secured to them under the provisions of Sections 1 and 2 of Article IV of the Constitution of the United States.

Fourth. That, inasmuch as all of the personal estate of said decedent has been fully administered and distributed, in due and regular proceedings had in the Orphans' Court of Morris County, New Jersey, a court of competent jurisdiction, and such administration was fully had and completed and the personal estate of
91 said decedent was fully distributed thereunder, without notice or knowledge of any claim on the part of the State of New York for any tax thereon, and as said executors had been appointed and qualified solely in the State of New Jersey, and had been duly discharged therein, the aforesaid determination and decision that the personal estate of said decedent in the State of New Jersey is subject to a transfer tax under the laws of the State of New York is a denial of the full faith and credit which is secured to the Statutes, and the judicial proceedings and determinations of the Courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors as citizens of New Jersey in their several individual and official capacities, in said State of New York; all as secured to them

under the provisions of Sections 1 and 2 of Article IV of the Constitution of the United States.

And the said Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, Executors as aforesaid, pray that the judgment aforesaid may be reversed and altogether held for naught, and that said Surrogate's Court of the County of New York be ordered and directed to vacate and set aside the same.

WILSON & WALLIS,
Attorneys for Executors, 48 *Wall Street,*
New York City.

92 [Endorsed:] Surrogate's Court County of New York. In the matter of the Transfer Tax upon the Estate of Albert Tilt, Deceased. Copy. Assignment of Errors. Wilson & Wallis, Attorneys for Executors, 48 Wall Street, New York. To —— —— Attorney for —. Filed Dec. 29, 1905.

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Surrogates of the County of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Surrogate's Court in and for the County of New York, State of New York, before you or one of you, having been remitted to you by the Court of Appeals of said State, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit entitled In the matter of the transfer tax upon the estate of Albert Tilt, deceased, wherein was drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a s[illegible]te of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution of, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as executors of the last will and testament and codicil of Albert Tilt, deceased, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you, if judgment be
94 therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty days from the date hereof, to be then and there held, that the record and proceedings aforesaid

being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of December in the year of our Lord one thousand nine hundred and five.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States
for the Southern District of New York.

Allowed by
R. W. PECKHAM,
Associate Justice of the
Supreme Court of the United States.

December 23d, 1905.

95 [Endorsed:] Surrogate Court County of New York In the Matter of the Transfer Tax upon the Estate of Albert Tilt, Deceased Writ of Error Wilson & Wallis, Attorneys for Executors 48 Wall Street, New York. To —— —— Attorney for —. Filed Dec. 29, 1905. 1.25 pd.

96 Surrogate's Court, County and State of New York.

In the Matter of the Transfer Tax upon the Estate of ALBERT TILT, Deceased.

Bond.

Know all men by these presents that we, Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as executors of the last will and testament and codicil of Albert Tilt, deceased, as principals, and the American Surety Company, of New York, as surety, are held and firmly bound unto Otto Kelsey, Comptroller of the State of New York, or his sucessor, in the sum of One Thousand Dollars ($1000.00) for the payment of which well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals. Dated the 13th day of December one thousand, nine hundred and five.

Whereas, the above named Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, executors of the last will and testament and codicil of Albert Tilt, deceased, have sued out a writ of error to the Supreme Court of the United States to review the record and proceedings of the Court of Appeals of the State of New York in the above entitled cause, and to reverse the judgment or decree of the Surrogate's Court of the County of New

97 York, entered in said cause on the 7th day of December, 1905.

Now, therefore, the condition of the above obligation is such that if the above-bounden Adelaide V. Tilt, Benjamin B. Tilt,

Joseph W. Congdon and John R. Curran shall prosecute said writ of error to effect and shall answer all damages and costs, if they shall fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

BENJAMIN B. TILT. [L. S.]
JOHN R. CURRAN. [L. S.]
ADELAIDE V. TILT. [L. S.]
JOS. W. CONGDON. [L. S.]
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By R. R. BROWN, *Vice-President.*

Attest:
CORTLANDT S. VAN RENSSELAER, *Attorney.*

192854

STATE OF NEW YORK, *County of New York, ss:*

On this 14th day of December, 1905, before me personally appeared Adelaide V. Tilt and Benjamin B. Tilt, to me known and known to me to be two of the individuals described in and who executed the foregoing bond, and severally acknowledged to me that they executed the same.

T. C. BAY,
[SEAL.] *Notary Public, N. Y. Co., No.* 239.

98 STATE OF NEW YORK, *County of New York, ss:*

On this 14th day of December, 1905, before me personally appeared John R. Curran, to me known and known to me to be one of the individuals described in and who executed the foregoing bond, and acknowledged to me that he executed the same.

T. C. BAY,
[SEAL.] *Notary Public, N. Y. Co., No.* 239.

STATE OF NEW YORK, *County of New York, ss:*

On this 14th day of December, 1905, before me personally appeared Joseph W. Congdon, to me known and known to me to be one of the individuals described in and who executed the foregoing bond, and acknowledged to me that he executed the same.

T. C. BAY,
[SEAL.] *Notary Public, N. Y. Co., No.* 239.

99 STATE AND COUNTY OF NEW YORK, *ss:*

On this 13th day of December, 1905, before me personally appeared R. R. Brown, Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the City of New York; that he is the Vice-President of the American Surety Company of New York, the corporation described in and which executed the above instru-

ment; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said R. R. Brown further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation; that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said R. R. Brown, Vice-President.

JOHN A. MANNING,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted and is still in force:

"Resolved, That the President and Vice-President be and they hereby are, and each of them is, authorized and empowered to
100 execute and deliver, and attach the seal of the Company, to any and all Bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing and guaranteeing bonds, and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary; one of the assistant secretaries or one of the attorneys."

COUNTY OF NEW YORK, *ss.:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company and do certify that the same is a correct and true transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at the City of New York, this 13th day of December, 1905.

CORTLANDT S. VAN RENSSELAER,
[SEAL.] *Attorney.*

101 [Endorsed:] Surrogates Court County of New York In the Matter of the Transfer Tax upon the Estate of Albert Tilt, Deceased Copy Bond Wilson & Wallis, Attorneys for Executors, 48 Wall Street, New York. Approved—(not to act as Supersedeas) Dec. 23, 1905. R. W. Peckham Asso. Jus. Sup. Ct. U. S.

102 UNITED STATES OF AMERICA, *ss:*

To Otto Kelsey, Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Surrogate's Court in and for the County of New York, wherein Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, as executors of the last will and testament and codicil of Albert Tilt, deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 23d day of December in the year of our Lord one thousand nine hundred and five.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

103 [Endorsed:] Surrogate's Court County of New York In the Matter of the Transfer Tax upon the Estate of Albert Tilt, Deceased Citation Wilson & Wallis, Attorneys for Executors, 48 Wall Street, New York.

Due and timely service of a copy of the within citation is hereby admitted.

Dated December 29 1905.

EDWARD H. FALLOWS,
Attorney for Comptroller of the State of New York.

104 State of New York, Court of Appeals, Reporter's Office, 33 Washington Avenue.

ALBANY, *Nov.* 28, 1905.

In the Matter of the Transfer Tax Upon the Estate of ALBERT TILT, Deceased.

Decided Oct. 17, 1905.
Order affirmed, with costs. No opinion.
Concur; Cullen, Ch. J., Haight, Vann & Werner, JJ.
Dissent; Gray & Bartlett, JJ.
Absent; O'Brien, J.
A copy minutes of decision.

E. A. BEDELL,
State Reporter.

C.

105 STATE OF NEW YORK, *County of New York, ss:*

I, Frank T. Fitzgerald, one of the Surrogates of said County, do hereby certify that I have compared the foregoing copy of the papers on appeal, remittitur, writ of error , &c. in the matter of the estate of Albert Tilt deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Surrogates' Court of the County of New York, this 10th day of January in the year of our Lord one thousand nine hundred and six.

[New York Surrogate's Seal.]

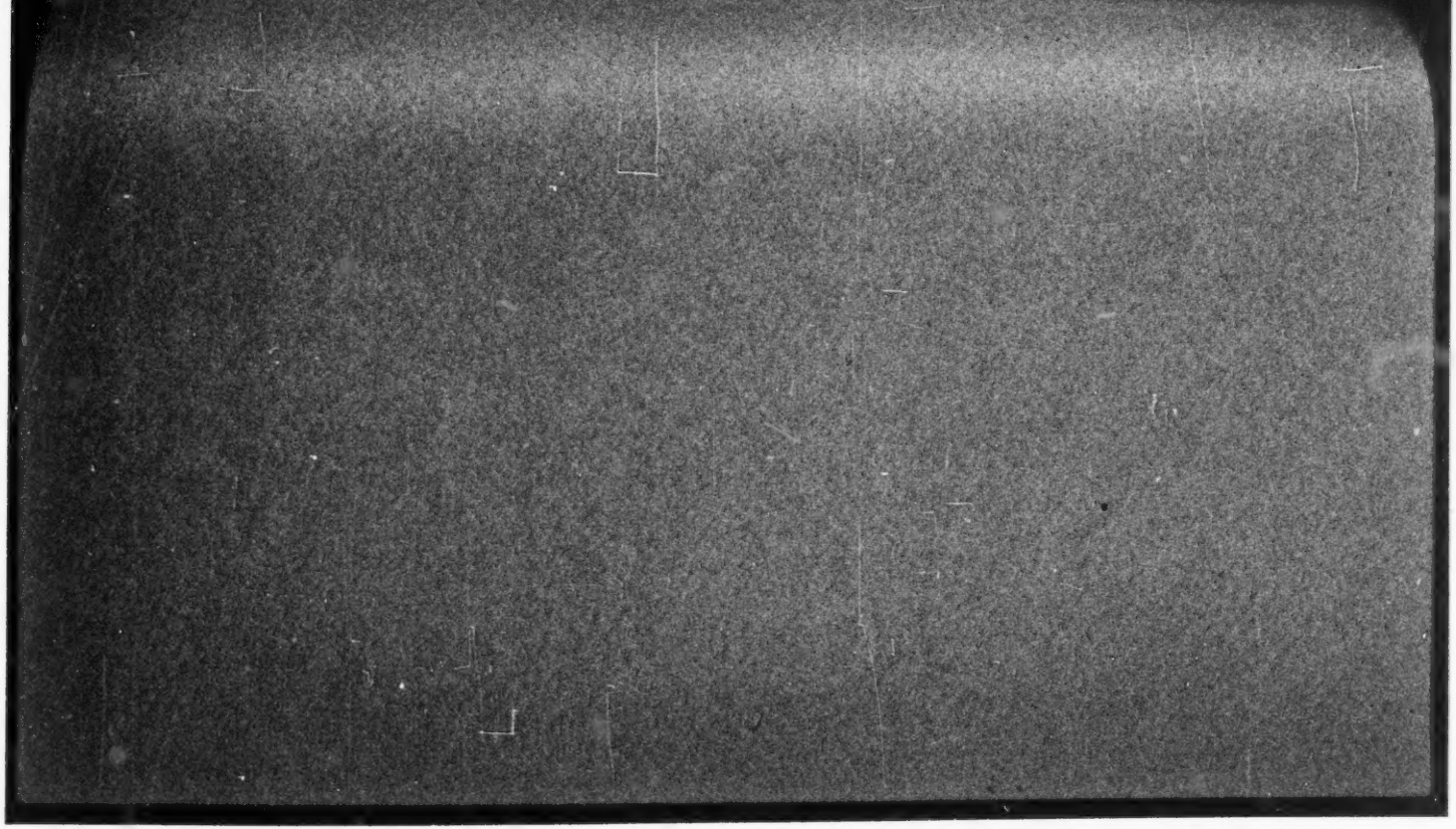
FRANK T. FITZGERALD, *Surrogate.*

Endorsed on cover: File No. 20,057. New York county surrogate's court. Term No. 187. Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran, as executors of the last will and testament and codicil of Albert Tilt, deceased, plaintiffs in error, *vs.* Otto Kelsey, Comptroller of the State of New York. Filed January 20th, 1906. File No. 20,057.

OTTO KELSEY,

New York,

WILLIAM G. WILSON,



Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 187.

ADELAIDE V. TILT, BENJAMIN B. TILT, JOSEPH W. CONGDON and JOHN R. CURRAN, as Executors of the last will and testament and codicil of Albert Tilt, deceased,

Plaintiffs in Error,

VERSUS

OTTO KELSEY, Comptroller of the State of New York,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error (55) to review the determination of the Court of Appeals of the State of New York (50) and the judgment of the Surrogates' Court of New York County entered thereon (51) affirming an order of that court (43) adjudging that Albert Tilt, the decedent, was a resident of the State of New York at the time of his death, May 2, 1900 (5), and the "personal estate of said Albert Tilt, wherever situated, is subject to the payment of a transfer tax under the Tax Law of the State of New York." The aggregate amount of the tax assessed upon the personal estate under this determination is $13,405.33 (35).

Under the New York statute, Chapter 399 of the Laws of 1892, such transfer tax is "due and payable at the time of the transfer" (§ 3), and, if not paid within eighteen months thereafter, "interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued" (§ 4).

The amount assessed, as above, with such interest to November 2, 1906, would be $22,118.79.

Statement.

Albert Tilt died May 2, 1900 (5). He left a last will and a codicil thereto.

The will (28–33) was made May 29, 1891. It recited that the testator was then "of the Borough of Manhattan, in the City and State of New York." By the Ninth clause of this will the testator established a trust in favor of his daughter Addie Estelle Acer in one fourth part of his residuary estate—including real as well as personal property—and constituted The Fifth Avenue Trust Company of the City of New York the trustee of such trust. And by the Thirteenth clause of this will the testator nominated and appointed his wife, Adelaide V. Tilt, and his sons, Benjamin B. Tilt and Albert Tilt, Junior, his executors.

The codicil (33–34) was made February 23, 1900. It recited that the testator was then "formerly of the Borough of Manhattan, in the City and State of New York, now of the Borough of Mount Arlington, in the County of Morris and State of New Jersey." By the Third clause of this codicil he revoked the appointment of The Fifth Avenue Trust Company of the City of New York, as trustee of the trust for the benefit of his daughter, and constituted the New Jersey Title Guarantee and Trust Company of Jersey City, in the State of New Jersey, the trustee of that trust. And by the Fourth clause of this codicil he revoked the appointment of his son, Albert Tilt, Junior, as executor, and in his place nominated and appointed his friends, Joseph W. Congdon, of Paterson in the State

of New Jersey, and John R. Curran, of said Paterson, as executors.

Both will and codicil were drawn by Hamilton Wallis, an attorney and counsellor at law of the States of New York and New Jersey (8), and a witness to both will and codicil (33, 34). In his instructions to Mr. Wallis for the drawing of the codicil the testator told Mr. Wallis that, since the drawing of the will, he, the testator, had changed his residence from New York to New Jersey, had removed all of his securities from New York to New Jersey, and intended to reside in New Jersey permanently ; and that for that reason he wished to substitute the New Jersey Title Guarantee and Trust Company for the Fifth Avenue Trust Company as trustee of the trust for the benefit of his daughter (8).

The testator's business interests were wholly in the State of New Jersey. For twenty-two years prior to his death he was President of the Phœnix Silk Manufacturing Company, a New Jersey corporation, having its factories and offices at Paterson, New Jersey. This was his principal business, and he held stock in this company to the amount of $985,900 par value, inventoried at $809,312.50. In this business for the last fifteen years of his life his executor, James W. Congdon, was associated with him. Prior to the execution of the codicil the testator told Mr. Congdon " that he no longer considered himself a resident of the State of New York, but of New Jersey, and that he wished to have his will changed so as to express his change of residence," and requested Mr. Congdon to accept the appointment of executor. He also said to Mr. Congdon " at or about the time the codicil was made that he had removed all of his securities from the State of New York to New Jersey, as he wished to have his property in the State where he resided " (11–12).

From the year 1889 the testator owned and maintained a residence at Mount Arlington, in Morris County, New Jersey, which he occupied with his fam-

ily and servants from May to October or November in every year, and kept open and in charge of servants and ready for occupancy "all the year round"; and it was frequently occupied by him or by members of his family, for short periods, at all seasons of the year (9). During this same period he also owned a house at No. 5 East Sixty-seventh Street in New York City, which was also kept open "the year round" in charge of caretakers and ready for occupancy when not occupied by the family (13). Thus the testator had two residences, one in New York and the other in New Jersey, each of which was habitually occupied by him and his family for about one half of the year, and occasionally during the other half.

During the summer of 1899 the testator frequently spoke to his son, Benjamin B. Tilt, of his intention to become a resident of New Jersey, instead of New York, and afterwards on several occasions said that he considered himself a resident of New Jersey (9).

Benjamin B. Tilt gave further details upon his oral examination. He said that the testator talked of changing his residence from New York to New Jersey "about the time we left for our country home, in June of '99" (17). "He talked about it all summer long." Said that he had decided absolutely to change his residence and then he was going to vote in Mount Arlington that fall" (18). "Q. Did you ever hear him state to yourself or to anyone else whether or not he considered himself a resident of New York or New Jersey? A. Yes, I did. Q. When? A. Right along the latter part of that summer after he had talked about it so much; and then he made the codicil—that was to show that he had absolutely become a resident of New Jersey. Q. And did he so state to you? A. Yes, he did. Q. More than once? A. Yes, several times. Q. Did you ever hear him make that statement to General Congdon? A. Yes, several times. Q. Did he state that he was going to make a codicil to his will for the purpose of changing his residence, or because

he had changed his residence? A. *Because he had changed his residence.* Q. What did he say about changing the trust company in New York? Did he say that he was going to change from the Fifth Avenue Trust Company to the New Jersey Title Guarantee & Trust Company for the purpose of changing his residence, or because he had changed his residence? A. *Because he had*" (18).

The property which the testator had in New York was real estate, household furniture, horses and carriages, and a small account in the Plaza Bank (20). The household furniture was valued at $8,000 and the horses and carriages at $3,000 (3), and the amount of cash in the Plaza Bank was $2,901.21; making $13,901.21, out of a total of personal property of $1,108,079.71 (3). The remainder of his personal property was in New Jersey (10).

This will and codicil of Albert Tilt were proved before the Surrogate of Morris County, New Jersey, as being the county in which the testator resided at the time of this death; the petition for probate described him as late of the Township of Roxbury in said county (25), Mount Arlington being within the legal limits of that township (28); the Surrogate assumed jurisdiction on the ground that Albert Tilt was at the time of his death a resident of Morris County, New Jersey, and no other ground of jurisdiction was shown; and that basis of jurisdiction was shown and is recited in the letters testamentary in compliance with the requirement of the New Jersey General Statutes (25–26).

The letters testamentary read as follows:

"Morris County Surrogate's Office, Morristown, N. J.

"I, DAVID YOUNG, Surrogate of said county, do certify the annexed to be a true copy of the last will and testament of Albert Tilt, late of the County of Morris, deceased, and that Adelaide V. Tilt, Benjamin B. Tilt,

Joseph W. Congdon and John R. Curran, the executors therein named, proved the same before me and are duly authorized to take upon themselves the administration of the estate of the testator, agreeable to the said will.

" Witness my hand and seal of office this 23rd day of May, in the year of our Lord, A. D., one thousand nine hundred.

" DAVID YOUNG,
" Surrogate."

The Surrogate's Seal of the County of Morris is affixed (26).

On May 24, 1900, an order was made by the Surrogate of Morris County, New Jersey, limiting the time of creditors of the estate of Albert Tilt to bring in their debts, demands or claims against that estate (27).

On February 25, 1901, a further order was made by the same Surrogate determining that the time so limited had expired, and that all creditors who had then neglected so to bring in their claims and demands " be forever barred from their actions therefor against the executors of said deceased." And this order, under the laws of New Jersey, the Surrogate had full and competent jurisdiction to make. And no claim of the State of New York against the estate of Albert Tilt was presented to the executors within the time so limited (27).

Thereafter the executors accounted in the Orphans' Court of Morris County, New Jersey, a court having jurisdiction under the laws of New Jersey to entertain such accounting and to direct final distribution of the estate of the testator thereon. Upon that accounting a decree was made in that Court by the judge presiding therein, on June 20, 1901, finally settling and allowing the accounts of the executors, and directing the distribution of the balance of the estate then remaining in their hands (27–28).

Thereupon, and prior to August, 1901, the executors made such distribution in conformity with the direc-

tions of that decree ; after which there remained no money or personal property whatsoever of the estate of Albert Tilt in their hands (28).

The executors paid the inheritance, succession and legacy taxes imposed on the estate of Albert Tilt by the laws of the United States and by the laws of New Jersey ; the United States taxes were paid to the Collector of Internal Revenue in New Jersey (28).

After all this had been done the State of New York first asserted its claim to a transfer tax (28) through a petition of Edward H. Fallows as Attorney for the State Comptroller and an order of the Surrogate of New York County thereon, on August 16, 1901, " for the appraisal, under the act relating to taxable transfers of property, of the property of Albert Tilt, deceased " (1).

The appraiser thereby appointed appraised the whole personal estate of the testator, and upon his report taxes amounting to $13,405.33 were assessed upon legacies amounting in the aggregate to $1,054,733.96 (35).

Upon appeal to the Surrogate (36) specifying the objections which are now presented here, the Surrogate affirmed this assessment and by order of May 17, 1905, entered it was

" Ordered and adjudged that the legal residence of said Albert Tilt was within the State of New York at the time of his death ; and that said personal estate of said Albert Tilt, wherever situated, is subject to the payment of a transfer tax under the Tax Law of the State of New York " (43–44).

The executors duly filed their exceptions (44–46) to the findings of the Surrogate, and took an appeal to the Appellate Division of the Supreme Court (1) where, after hearing the order of the Surrogate was affirmed (48), Judges PATTERSON and INGRAHAM dissenting. (*Matter of Tilt*, 107 App. Div. 616.)

On appeal to the Court of Appeals (49) and after hearing, the determination of the Appellate Division

was affirmed, Judges GRAY and BARTLETT dissenting, (*In re Tilt*, 182 N. Y. 657,) and the record was remitted to the Surrogates' Court (50–51), where final order of affirmance was entered October 18, 1905 (51), which is now brought here upon writ of error (55).

No opinion was delivered by the Appellate Division or by the Court of Appeals ; and the only opinion delivered by the Surrogate was in these words :

" Estate of Albert Tilt.—On the evidence submitted I will determine as a fact that the decedent was at the time of his death a resident of New York County " (38).

Assignment of Errors.

FIRST. That inasmuch as in conformity with the statutes of the State of New Jersey, the will of said Albert Tilt, the decedent, was established and admitted to probate by the Surrogate of Morris County, New Jersey, a court of competent jurisdiction, as the will of a resident of New Jersey, and said will was never offered for probate or admitted to probate in any court or tribunal of the State of New York, and said executors derived their authority wholly from such probate and the issue of letters testamentary to them by said Surrogate of Morris County, New Jersey, and not otherwise, such action of such court of the State of New Jersey, which has never been vacated, reversed or set aside in that State, is conclusive upon the question of the residence of the decedent, upon all parties having any interest in his estate, and that the aforesaid determination and decision herein that said Albert Tilt was, at the time of his death, a resident of the State of New York, is a denial of the full faith and credit which is secured to the statutes, and the judicial proceedings and determinations of the courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors as citizens of New Jersey in their several individual and official capacities, in said State of New

York ; all as secured to them under the provisions of Sections 1 and 2 of Article IV of the Constitution of the United States.

SECOND. That, inasmuch as, in compliance with the statutes of New Jersey, notice was duly given to all persons having any claim against the estate of said decedent, and no claim on behalf of the State of New York was ever presented thereunder, and an order was duly made thereafter, barring all claims against the said executors thereunder, and said executors were appointed and qualified solely in the State of New Jersey, the aforesaid determination and decision that the estate of the said Albert Tilt within the State of New Jersey was subject to a transfer tax under the laws of the State of New York, is a denial of the full faith and credit which is secured to the statutes, and the judicial proceedings and determinations of the courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors as citizens of New Jersey in their several individual and official capacities in the State of New York ; all as secured to them under the provisions of Sections 1 and 2 of Article IV of the Constitution of the United States.

THIRD. That, inasmuch as the right to bequeath and dispose of property by last will and testament is derived solely from provisions of positive law, and the taxing of the right of succession through such last will and testament is dependent upon the right so conferred by provisions of positive law, and as the last will and testament of said decedent derives its sole force and effect as to his personal estate which was within the State of New Jersey from the laws of that State and from its establishment as his last will and testament through probate in the proper court of that State, and said executors were appointed and qualified solely in the State of New Jersey, the aforesaid determination and decision that the personal estate of said

decedent in the State of New Jersey is subject to a transfer tax under the laws of the State of New York is a denial of the full faith and credit which is secured to the statutes, and the judicial proceedings and determinations of the courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the testator and said executors as citizens of New Jersey in their several individual and official capacities in said State of New York; all as secured to them under the provisions of Sections 1 and 2 of Article IV of the Constitution of the United States.

FOURTH. That inasmuch as all of the personal estate of said decedent has been fully administered and distributed in due and regular proceedings had in the Orphans' Court of Morris County, New Jersey, a court of competent jurisdiction, and such administration was fully had and completed and the personal estate of said decedent was fully distributed thereunder, without notice or knowledge of any claim on the part of the State of New York for any tax thereon, and as said executors had been appointed and qualified solely in the State of New Jersey, and had been duly discharged therein, the aforesaid determination and decision that the personal estate of the said decedent in the State of New Jersey is subject to a transfer tax under the laws of the State of New York is a denial of the full faith and credit which is secured to the statutes, and, the judicial proceedings and determinations of the courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors in their several individual and official capacities in said State of New York; all as secured to them under the provisions of Sections 1 and 2 of Article IV. of the Constitution of the United States.

ARGUMENT.

The question of residence, when arising upon undisputed facts, is, like all other questions arising upon undisputed facts, a question of law. It is the province of the court to draw the proper legal conclusions from admitted or established facts. And it cannot affect the controlling force of this rule, based upon fundamental principles, that the conclusion so drawn is stated in the form of a finding or adjudication of matter of fact.

It will be seen that, in the present case, the facts in no wise compel to the conclusion that Albert Tilt was legally a resident of New York at the time of his death, but are wholly in harmony with the jurisdiction assumed by the New Jersey courts in admitting his will to probate and administering his estate, and involve no elements or features which could justify the courts of New York in denying full faith and credit to the probate and administration in New Jersey.

It seems desirable, therefore, for the fullest understanding of the matter, to consider first the facts relative to residence, and their natural and legal effect; and then the action of the New Jersey courts, and the faith and credit which should be accorded to that action.

POINT FIRST. The legal residence of Albert Tilt at the time of his death was in the State of New Jersey.

The right, in this country, of each individual, to change his residence at will, cannot be questioned.

Change of citizenship, as distinguished from change of residence, is not always so simple a matter. As between this country and foreign countries a change of citizenship must be accompanied by

acts of more or less solemnity, as in abandoning allegiance to one and vowing allegiance to the other. But ordinarily in a change of citizenship from one state of the union to another no special formalities are required, and a change of citizenship naturally follows a change of residence, unless some intention to the contrary is manifested.

But a change of residence does not in itself necessarily involve any change of citizenship. A change of residence between two towns or cities of the same State is accomplished in precisely the same way as a change of residence between two towns of cities of different States.

The legal requisites for effecting such a change are but two: an intent; and an act in furtherance of that intent.

The intent, not acted upon, is a mere condition of mind, which, without the co-operation of the act, brings forth no fruit.

The act, without the intention, means nothing, because the actor means nothing by it.

In many cases cited the intent is not clear, and has to be inferred from the act, and the circumstances surrounding the act. But when the intent is clear, acts in furtherance of it should be interpreted in the light of the known intent.

The general rules are summarized by Judge RAPPALO in *Dupuy v. Wurtz*, 53 N. Y., as follows: "One leading rule is that for the purposes of succession every person must have a domicil somewhere, and can have but one domicil. * * * To effect a change of domicil for the purpose of succession there must not only be a change of residence, but an intention to abandon the former domicil, and acquire another as the sole domicil. Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two together do constitute a change of

domicil. * * * The question what shall be considered the domicil of a party, is in all cases rather a question of fact than of law. With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; and, moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight. * * * The intention may be gathered both from acts and declarations. Acts are regarded as more important than declarations, and written declarations are more reliable than oral ones."

Chief Justice SHAW, in *Thorndike v. Boston*, 1 Met., 242, said: "The questions of residence, inhabitancy or domicil,—for though not in all respects precisely the same, they are nearly so, and depend upon much the same evidence,—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim that every man must have a domicil somewhere; and also that he can have but one. Of course it follows, that his existing domicil continues until he acquires another; and *vice versa*, by acquiring a new domicil, he relinquishes his former one. From this view it is manifest that *very slight circumstances* must often decide the question."

The right which every individual has to change his residence at will could not be denied or restricted in the case of the present testator, Albert Tilt, by reason of the fact that he already possessed two "homes," one in New York City, and one in Mount Arlington, New Jersey, and occupied each, with his family, for about one-half of each year. It would seem that his was emphatically one of the cases where, in the

language of Chief Justice SHAW "very slight circumstances must often decide the question."

As it was competent for Albert Tilt to have his legal residence in New York, while living one-half of the year in his house at Mount Arlington, New Jersey, it was equally competent for him to have his legal residence in New Jersey, while living one-half of the year in his house in New York City. It was no more essential or important for him to give up and abandon his house in New York City in order to have his legal residence in New Jersey, than it was for him to give up and abandon his house at Mount Arlington in order to have his legal residence in New York.

Obviously, then, in the present case, the evidence of legal change of residence is not to be sought in a visible change of his habit of the past ten years to divide his time about equally between those two houses, but in other acts conforming to his clearly proved intention, and wholly unexplained unless done in pursuance of that intention.

Three specific acts of this sort are shown: The removal by Albert Tilt of his personal securities from New York to New Jersey; the substitution of two residents of New Jersey, Gen. Congdon and Mr. Curran, as executors; and the substitution of the New Jersey Title Guarantee and Trust Company in place of the Fifth Avenue Trust Co. as trustee of one quarter of his residuary estate, for the benefit of his daughter. And these the testator spoke of as acts which he had done because of his change of residence. He told Mr. Wallis that he *had changed* his residence and *had removed* his securities from New York to New Jersey (8). He told Mr. Congdon that he *had removed* all his securities from New York to New Jersey "*as he wished to have his property in the State where he resided*" (12). He said to the latter that he wished to change his will so as to express his change of residence (12). And under the solemnity of the making of a codicil to his will, he

declared himself to be "formerly of the Borough of Manhattan, in the City and State of New York, now of Mount Arlington, in the County of Morris and State of New Jersey" (33). All of his personal property was in New Jersey at the time of his death, with the exception of $2,901.21 cash on deposit in the Plaza Bank, and the furniture, horses and carriages in New York City (10).

It is difficult to imagine anything more which the testator could have done to carry into effect his declared intention, short of abandoning his New York house, which he was clearly under no obligation to do.

To hold, as the courts of New York have held, that the legal residence of Albert Tilt remained unaffected by this clearly expressed intention, by these undisputed acts done in avowed furtherance of that intention, and otherwise purposeless and meaningless, and by the further declarations that this intention had been carried out, is to deny to him and to all similarly situated the right to change his residence at all.

There lurks in the argument in behalf of the State the suggestion that there is some sort of moral obliquity involved in such a change of residence; that in some kind of a way every resident owes the State a duty to die a resident and thus subject his estate to a transfer tax, and that such change of residence as Albert Tilt attempted, and believed he had made, operated or would operate to defraud the State of some vested right, and should be discredited in the interest of public policy.

It is needless to say that this view has no support in either morals or law. The absolute right of every man to change his residence from one town or city or state to another is not limited or affected by the difference in the rates of taxation in one locality or the other upon his estate, in life, or in death. If it were otherwise, if it were reprehensible to change from a higher to a lower rate of taxation, so that every presumption, like that of innocence, would

run to the contrary, and the offense must be clearly proved, *not* to secure punishment, but *to secure success;* then, on the other hand, it would be an act of positive merit to change from a lower rate of taxation to a higher one, with every presumption in its favor.

There is no more reason why a man should not choose his residence where the taxes are least heavy, than there is why he should not choose it where rents are lowest. As was said by MORTON, J., in *Thayer v. Boston*, 124 Mass., 139, "The fact that any man changes his home or his domicil for the purpose of avoiding, or escaping, or lessening his taxes, is of no consequence whatever." And to this the opinion of the Supreme Court adds (p. 148): "The wish to change for that purpose does not tend to show any want of a real intention to change, but *rather the contrary.*"

In Story on Conflict of Laws, Section 47, it is said: "Eleventhly, if a married man has two places of residence at different times of the year, that will be deemed his domicil which he himself selects, or describes, or deems to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen;" citing among other cases *Somerville, v. Somerville*, 5, Vesey, 750.

In *Somerville v. Somerville*, the question was whether the personal estate of Lord Somerville was to be administered under the law of Scotland or under that of England. He had domicils in both countries, dividing his time between them. He died in London. The Master of the Rolls said: "Here the question is which of the two acknowledged domicils shall preponderate; or rather which is the domicil according to which the succession to the personal estate shall be regulated." "The succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death; without any regard whatsoever to the place either of the birth or death, or the situation of the pro-

perty at the time." "A man may have two domicils for some purposes, but he can have only one for the purpose of succession." Upon the facts shown, the chief one of which was that some time before his death Lord Somerville *had talked about making a will in Scotland*, it was adjudged that Scotland was his domicil for purposes of succession.

In *Thayer v. Boston*, 124 Mass., 132, the plaintiff, who had paid taxes to the City of Boston under protest, sued and recovered a verdict for them. He had two residences, both in Massachusetts; one being in Boston and one in Lancaster. Prior to 1869, while his legal residence was admittedly in Boston, he had entertained and declared an intention of changing his residence at some time to Lancaster, but had fixed no definite time. In 1868, his taxes in Boston having been increased, he declared to the assessors that if they should be again increased he would pay no more taxes in Boston. They were again increased in 1869, and thereupon the plaintiff gave notice to the assessors that he had removed his residence to Lancaster. He continued after this notice, as before, to divide his actual occupancy between the two residences, and did no act to effect any change of residence, beyond giving this notice. The Supreme Court, upon full hearing, ordered judgment for plaintiff on the verdict, approving the language of MARTIN, J., in his instructions to the jury as follows:

"Generally, where the question is whether a man has changed his home, it is easy to determine; because, ordinarily, a man has either to build or buy or hire a house for himself and his family in the new town to which he intends and purposes to remove; and that fact would ordinarily be so significant a fact of his intention, and where he moves into the house that fact would be so significant of his actual change of his home, as would compel the mind to the conclusion that he had changed his domicil, and that he intended to do so. The plaintiff was under no such necessity, because he had two establishments at the

time, one in Boston and one in Lancaster, both, according to the evidence, complete establishments, fit to move into at a moment's notice.

But still, before he could effect a legal change of his domicil, he must have done something. * * * If you are satisfied that a man has an honest intention and purpose to change his home from Boston to Lancaster, under the circumstances in which the plaintiff was placed, that intention would be very significant as illustrating and giving character to even trifling acts that he might have done in carrying out that intention—trifling acts that he might have done to remove his domicil in pursuance of that intention." The plaintiff's notice to the assessors was the only evidence of the fact of change, and was held sufficient inasmuch as the verdict which rested on it was sustained.

During the summer of 1889 the testator frequently expressed his intention of making New Jersey the place of his legal residence. He could not accompany these expressions by the corresponding act of removing from New York to New Jersey, *because he was actually living in his New Jersey home at the time.* But he could and did declare that whereas he had previously come to New Jersey *animo revertendi*, he had now come there *animo manendi.* He was actually residing in New Jersey when he declared this intention, and thenceforth he acted upon the assumption that the change had been effected, and shaped his testamentary provisions in conformity with it. In October he came back to New York a very sick man, too ill to carry out his intention of voting at Mount Arlington that fall (18, 24) and he died on the second day of May, following.

The requirements of the case are to be judged in the spirit of the utterance of Judge DANFORTH in *Bassett v. Wheeler*, 84 N. Y. 466: "I am unable to see *how she could do more than she has done* to indicate her inten-

tion to become a resident of New York, or to carry that intention more completely into effect."

And, so far as these declarations are concerned, they fall precisely within the principle laid down by Chancellor WALWORTH in *Matter of Roberts*, 8 Paige, 519. There the testatrix had formerly been domiciled with her husband in Cuba. They had left Cuba four years before and in 1837 were residing on Staten Island. In that year the testatrix went to Cuba alone "to see to their property, which remained on that island," and while she was in Cuba her husband died at Staten Island. She then announced to her friends in Cuba her intention of fixing her residence in Cuba, and of returning there after settling the affairs of her husband in New York. She died on the voyage to New York. The Chancellor said: "These are not mere declarations of a future intention to change an actual residence from Staten Island to the island of Cuba, for the purpose of changing her domicil. Such declarations, I admit, would not, without an actual removal from the former place of residence, be sufficient to constitute a change of domicil. But in this case, it must be recollected, that at the time the declarations were made her husband was dead; and she, having no family, was *actually residing in Cuba*, where she declared it to be her intention to fix her permanent residence for the remainder of her life. * * * The declarations of the party himself, where he can have no object or inducement to falsify the truth or to deceive those to whom such declarations were made, are the best evidence of his intention to make his actual residence his permanent residence also. Here the declarations of the decedent appear to have been repeatedly and deliberately made, at different times and to various persons; and I think there can be no reasonable doubt that she intended what she said." It was held that, upon this evidence, the domicil in Cuba was sufficiently established.

If the question of the residence of Albert Tilt arose between private parties, and affected the validity of his testamentary dispositions of his property, it cannot well be doubted that his change of residence had been effectual. If the will and codicil contained provisions establishing trusts valid in New Jersey and invalid in New York, no court would be justified, upon the evidence here, in defeating the intention of the testator, by holding that he remained legally a resident of New York in spite of his doing everything possible to become legally a resident of New Jersey.

Certainly the consideration that by such change the State of New Jersey gains, and the State of New York loses, the right to exact a succession tax on the death of the testator, does not alter the ordinary rules, or entitle the State of New York to any more favor than if the question of legal effect arose wholly between private parties.

POINT SECOND. The probate of the will of Albert Tilt in New Jersey is conclusive upon the question of his residence for purposes of administration and tax.

Article IV, Section 1, of the Constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

To no proceedings does this provision apply with greater force than to those which involve the administration of the estates of decedents. The state stands as guardian of all interests in these estates; provides for safeguarding those interests, whether of next of kin, legatees, or creditors, and for the safe keeping of the property from the time of death of the decedent to the time of final distribution. The state regulates the succession, whether in intestacy or through the privilege of testamentary disposition; and in certain cases

the state itself takes the decedent's property, and holds it for its own benefit.

In all such matters the state acts in the exercise of its sovereignty. It has absolute control, except for the limitations imposed by the Constitution of the United States; and that very Constitution recognizes and enforces the sovereignty of the state within those limitations, in the very provision above quoted.

The authorities defining the scope and effect of this constitutional provision in its application to a case like the present one are summed up by Justice LEVENTRITT in *Plant v. Harrison*, 36 Misc. (N. Y.), 649. The question was whether the probate in Connecticut of the will of Mr. Plant was conclusive upon the question of Mr. Plant's residence, and upon the determination of this question hung the validity of the will which contained provisions for perpetuities allowed in Connecticut but forbidden in New York.

The point is thus stated in the opinion (p. 678): "The decree of the probate judge of New Haven, admitting the will of Mr. Plant to probate as the will of a resident of New Haven, is conclusive here if it is conclusive there. If a collateral attack can be made upon it there, then such an attack can be made upon it here with the resultant consequence of declaring his *correct* domicil, as I have declared it, and of admitting his will here as that of a resident of this state at the time of his decease. The faith and credit given by law and usage by the Connecticut courts to a probate decree when attacked collaterally in the courts of Connecticut, is what we must now turn our attention to. As was said in *Hancock National Bank v. Farnum, supra*, the question is not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of Connecticut. It may be said at the outset of this discussion that the defendant's position would be well nigh unexceptionable

were the judgment or decree one rendered in the great majority of the states of the Union."

In following out this line of inquiry an extended examination of the decisions of the courts of Connecticut led to the conclusion that while the probate courts of this country, originally derived from the ecclesiastical courts of England, have, in the great majority of instances, outgrown their limited and inferior jurisdiction, Connecticut "has remained *a signal exception*, and there the *sounder rule* that when the mistake is one of fact, the record should be collaterally invulnerable, *has not found favor* in the case of the Probate Courts." For this reason, that is, that the probate was not conclusive in Connecticut, and for this reason only, it was held that it was not conclusive in New York,—and that the courts of New York were therefore free to treat the question of Mr. Plant's residence as an open question and to determine it upon the evidence before them.

In the present case, upon the same reasoning and the same authority, the decree of the Surrogate of Morris County, New Jersey, admitting the will of Albert Tilt to probate as the will of a resident of that county, is conclusive here if it is conclusive in New Jersey. If a collateral attack can be made upon it there, then it can be made upon it here, with the resultant consequence of declaring Albert Tilt's correct domicil to have been New York, and not New Jersey, if the proofs so establish it. But if the probate is conclusive in New Jersey the question is not an open one. And, adopting the language of *Hancock National Bank v. Farnum*, 176 U. S. 643, this is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of New Jersey.

These decisions show that New Jersey is not, as Connecticut is, an exception to the general rule that

the record of probate should be collaterally, invulnerable.

In *Matter of Abraham Caursen's Will*, 3 Green's Ch. 406, the Chancellor, sitting as Ordinary of the Prerogative Court, said of the Surrogates: "Their acts were recognized as valid by the courts, and they came to be considered as lawful and competent judges of the matters submitted to their cognizance. And although they are unknown to the constitution they have been frequently recognized by acts of the legislature." "I receive the certified copy of the surrogate's proceedings as a verity. I am bound to respect his attestation under his official seal. In this Court it has the effect of a record against which I cannot admit counter averments. The proof which has been offered to impeach it I cannot receive. Any error or irregularity in the proceedings of the surrogate can come before me only by appeal."

In *Straub's Case*, 49 N. J. Eq. 264, the Chancellor, sitting as ordinary, said: "The Surrogate's probate was a *judicial act*, and, as such, is conclusive until it shall be vacated, either through appeal or by proceedings in direct attack upon it."

In *Quidort's Case*, 3 C. E. Green, 472, it was held by the Chancellor: "The granting administration is exclusively with the ordinary and his surrogates. The grant is a proceeding *in rem*, in the strict sense of that term. It constitutes the person to whom it is granted, the administrator, whether rightly or wrongly granted; and it cannot be inquired into here collaterally. The act of the Surrogate can only be reviewed by appeal to the Orphans' Court or Prerogative Court. Like the acts of all other regularly constituted tribunals, the acts of the Surrogate cannot be impeached collaterally."

And in *Ryno's Executor v. Ryno's Administrator*, 12 C. E. Green, 522, where the will had been admitted by the Surrogate, it was said by the Court of Errors and Appeals: "The probate of this will was granted immediately after the death of the wife, by the officer

upon whom the law has conferred the exclusive power of granting probate and administration. It was a *judicial act* of a tribunal having competent authority, and *is conclusive* until repealed. So long as a probate remains unrevoked, the seal of the ordinary cannot be contradicted; neither can evidence be admitted to impeach it in a temporal court."

The same rule has been repeatedly applied by the Courts of New York.

Thus it was said by Judge PECKHAM in *Bolton v. Shriever*, 135 N. Y., 65, 69: "The petition of the executor named in the will to the Surrogate of New York, alleged that the deceased was at or immediately previous to his death, an inhabitant of the County of New York, by means of which the proving of the will belonged to such Surrogate. The Surrogate, in admitting the will to probate and issuing letters testamentary to the executor, in effect decided the fact of inhabitancy, for it was a fact necessary for the Surrogate to decide before admitting the will to probate or granting letters, and his decision of that fact, based upon evidence having a legal tendency to support it, ought, it would seem, on general principles, to stand until reversed or set aside, even though it were erroneous."

In *Roderigas v. East River Savings Institution*, 63 N. Y., 460, 467, it had been said: "The fact of inhabitancy is frequently one difficult to be determined. It is one the Surrogate *must* determine before he can issue letters, and its determination frequently depends upon disputed and fallible evidence; and if error as to the fact of death will leave him with no jurisdiction, so will error as to the fact of inhabitancy, and the consequence will be that in such a case his proceedings will give no protection to anyone. A construction of the statutes which will lead to such results will make the laws as to the jurisdiction and proceedings of Surrogates' Courts difficult and hazardous to execute, and should not be tolerated unless the language used will admit of no other construction."

This decision was subsequently reconsidered in *Rodrigas v. East River Savings Institution*, 76 N. Y., 316, and while, owing to changes in the proofs, the Court modified its prior utterances as to the conclusiveness of a finding of the fact of death, it reaffirmed what it had said as to the conclusiveness of the determination of the fact of residence. "There are some general rules," said CHURCH, C. J., "that are well settled. One is that the proceedings of Courts, especially of limited jurisdiction, may be attacked collaterally for want of jurisdiction over the subject matter. Another is that if the Court or officer has jurisdiction of the subject matter, then the exercise of that jurisdiction however irregular or erroneous is *conclusive* until reversed. Surrogates' Courts have a stinted jurisdiction, but their decrees and orders are protected, when acting within their jurisdiction. If the Surrogate has jurisdiction of the general subject matter, and may exercise that jurisdiction in a variety of cases *depending upon residence* and the like, his decision after a hearing of the parties upon the question whether the case calling for the exercise of jurisdiction exists or not, is protected from collateral attack."

In the prior case of *Kinnier v. Kinnier*, 45 N. Y., 535, 540, the same learned judge, writing the opinion of the Court had said: "Sufficient facts are alleged to give the Illinois court power to decide the question of domicil, and the judgment is not void, if we concede the decision was erroneous. A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally."

In *Schluter v. Bowery Savings Bank*, 117 N. Y., 125, 130, the court said: "The statutes of New Jersey were proved, showing that the Surrogate of the county, of which Mrs. Knittel was an inhabitant and resident at the time of her death, had jurisdiction to grant letters of administration upon her estate. While he had no authority to grant letters of administration unless she died intestate, intestacy, *like inhabitancy*, was one of the facts which he was to determine. He had general

jurisdiction of the subject of administration, and having determined that she died intestate, he was authorized to grant administration upon her estate."

Two decisions of this court have been cited as at variance with the rule laid down in the above cases. This claim is not well founded.

The first is *Thorman v. Frame*, 176 U. S., 350. The decedent died in Louisiana, owning there a tomb with some accompanying seats and vases. He left a will describing himself as of Wisconsin, where he had a residence and a considerable amount of personal property. After the will had been offered for probate in Wisconsin a daughter of the debtor on an *ex parte* application took out letters of administration in Louisiana. It was held that this was not conclusive as to decedent's domicil, which was material only as affecting the validity of the will; as there was necessarily administration in each state of the property therein. "The order of appointment by the Louisiana Court did not make, nor did the letters themselves recite, any finding as to Fabacher's last domicil, and as he died in the parish of Orleans, and owned, as contended, immovable property and effects, there, such a finding was wholly unnecessary to jurisdiction, and is not to be presumed."

The second is *Overby v. Gordon*, 177 U. S., 214. The estate of the decedent, with trifling exceptions, was within the District of Columbia at the time of his death; he had some little property in the State of Georgia. On January 23, 1896, his will was offered for probate in the District of Columbia as that of a resident of that District, and on March 6, 1896, certain of the next of kin appeared and filed a caveat against the probate. On April 6, 1896, the same next of kin, who had filed the caveat in the District of Columbia against the probate, filed an unverified petition in Georgia, alleging that decedent was a resident there and had died intestate leaving property there, and on that petition letters of administration were issued in

Georgia in May, 1896. The granting of such letters in Georgia was held not to be conclusive as to the question of residence, upon the issues which had already been raised in the proceeding for probate in the District of Columbia. And it was held that the courts of each jurisdiction had the undoubted power to direct the administration of the decedent's property within that jurisdiction.

These two cases have much in common. In each the parties dissatisfied with the will of the decedent undertook to cut off the legitimate proceedings for probate by going into another jurisdiction where the testator had left a little property, and by filing there an application for administration upon the false statement that the decedent had left no will, and by obtaining letters of administration there, *ex parte*, on the strength of that false statement.

In each of these two cases the application for administration in the second jurisdiction after the will had been offered for probate in the first, was manifestly designed to *create* evidence of intestacy and of non-residence in the first. It was a fraud upon the probate courts of the second jurisdiction, and the grant of administration in those jurisdictions would have doubtless been set aside in those jurisdictions upon a proper application by the executors, showing the true state of facts, if the property within those jurisdictions had been of sufficient value to make it worth the while.

In each case the courts of the first jurisdiction had acquired jurisdiction to determine the validity of the will, and the resultant question of intestacy, before administration was sought in the second jurisdictions, upon the alleged ground of intestacy. The testator had a right, which devolved upon his executors, to have his estate administered under his will; and his legatees and devisees had the same right. And these rights could not be cut off by the device of having a dissatisfied party go to another state and there obtaining administration through a false denial of the exist-

ence of a will. And both of these decisions are abundantly supported by that ground.

In both cases the executors contented themselves by sustaining the wills in the jurisdictions where they had been offered for probate, where they had brought before the court all persons entitled to be heard upon the question of probate, including the very persons who had thus sought administration elsewhere. And thus these courts had both jurisdiction *in rem* as to the property within the limits of their territorial jurisdiction, and jurisdiction *in personam* over all parties interested in the questions presented by the offer of probate.

In the present case there is no question of conflicting administrations. The will was duly probated in New Jersey. There has been no attempt at administration elsewhere. The whole of the testator's personal estate, with trifling exceptions was within the State of New Jersey, whose courts had the undoubted right to administer upon it, and to determine the questions of the validity of the will and the residence of the testator, for the purpose of such administration.

POINT THIRD. The claim of the State of New York against Albert Tilt's executors for the payment of a succession tax was barred by the failure of the State of New York to present that claim upon the administration in New Jersey.

On May 24, 1900, an order was made by the Surrogate of Morris County, New Jersey, limiting the time of the creditors of the estate of Albert Tilt to bring in their debts, demands, or claims against that estate; and on February 25, 1901, a further order was made by that Surrogate determining that the time so limited

had expired, and that all creditors who had then neglected to bring in their claims and demands "be forever barred from their actions therefor against the executors of said deceased"; and this order the Surrogate had, under the laws of New Jersey, full and competent jurisdiction to make (27).

If the claim of the State of New York to a transfer tax against the estate of Albert Tilt was valid as regards the property in New Jersey, the State of New York was in New Jersey nothing more than a creditor of the estate.

It is true that section 222 of the New York Tax Law says: "Every such [transfer] tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment."

But it was clearly incompetent for this or any statute of New York to create a lien in its own favor upon property in New Jersey. The statutes of New York have no force or effect of their own beyond the boundaries of the State. If the State of New York wishes to assert a claim outside of its own limits, it must leave its sovereignty behind, and put itself upon the level of any other suitor.

It is not to be supposed that if this claim had been presented in obedience to the order of the New Jersey Surrogate, it would not have been considered, and determined upon its merits. The New Jersey court had undoubted jurisdiction to reconsider its determination of the question of residence as bearing on the rights of any creditor, and it is inconceivable that it would not have done so, justly and fairly.

But no such claim was presented. Nor was any notice given of the existence of any such claim until after full administration and distribution and after the State of New Jersey had collected its own succession tax upon the estate of Albert Tilt as a resident of New Jersey (28).

There is no reason, therefore, why the executors are not entitled to the benefit of this order as barring any action againsi them upon this claim, with like effect as in the case of all other claims barred by the same order.

POINT FOURTH. The transfer and succession of the estate of Albert Tilt took effect under the laws of New Jersey and are not taxable under the laws of New York.

The right of succession to the property of a decedent, either through intestacy or through last will and testament, is derived purely from provisions of positive law.

As was said in *United States v. Perkins*, 163 U. S., 625, "While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control."

"In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose."

In *Magoun v. Trust Co.*, 170 U. S., 283, 288, after stating that legacy and inheritance taxes were in force in many of the states, including New Jersey and New York, and citing many cases in which they had been upheld, the opinion goes on to say: "It is not neces-

sary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

As was said by Judge CULLEN, in *Matter of Vanderbilt*, 172 N. Y., 6974, "a tax is a property tax when imposed by reason of the ownership of property; a transfer tax when imposed on the method of its acquisition."

The present claim of the State of New York of the right to collect a transfer tax upon the succession to the estate of Albert Tilt must rest, therefore, upon the proposition that such succession derived its efficacy from a privilege conferred by the laws of New York, and the conditions which the authority conferring that privilege has imposed upon its exercise and enjoyment.

But this proposition is not supported by the facts.

The efficacy of the will to transfer to the various legatees the property which is here sought to be subjected to the New York Transfer Tax was in no way derived from any privilege conferred by the laws of New York, or from any action of any court or officer of New York.

The will was validated by the laws of New Jersey, contained in the New Jersey statute of wills. It derived its efficacy from its conformity with the provisions of that statute and from its admission to probate by the Surrogate of Morris County, New Jersey. Under that autority the executors have qualified, and have received and distributed the estate. And the executors have paid to the State of New Jersey the succession tax which the laws of that state have imposed as a condition of the privilege conferred by those laws, upon the testator in allowing him to

bequeath his personal property, and upon the legatees in allowing them to succeed to it.

Thus this claim of the State of New York wholly fails for want of consideration.

POINT FIFTH. The administration in New Jersey is a bar.

The probate was but the first step in the course of administration upon the personal estate of Albert Tilt.

Every argument for the conclusiveness of honest and legitimate probate applies with vastly greater force in favor of the conclusiveness of full and complete administration and distribution.

The probate is conclusive until it is reversed and set aside. But, in the very nature of things, a completed administration and distribution, fairly and regularly conducted, cannot be reversed or set aside. The legatees have acquired title and possession of their legacies, and the executors, after complying with all orders and directions of the court and distributing all property in their hands, are freed of all further liability.

In the present case the executors accounted in the Orphans' Court of Morris County, New Jersey, and on June 20, 1901, a decree was made in that court finally settling and allowing their accounts and directing the distribution of the balance remaining in their hands; such distribution was actually made by them prior to August, 1901, and after that distribution no money or personal property of the estate of Albert Tilt remained in their hands; and the present claim was not asserted until the initiation of this proceeding, on August 16, 1901 (27-28), after payment of succession taxes to the State of New Jersey and to the United States (28).

It is settled beyond controversy that the probate of a will is, of itself, a proceeding *in rem* Thus it is said in *Tompkins v. Tompkins*, 1 Story, 547: "Such sentences [of probate] are treated as of the like nature of sentences or proceedings *in rem*, necessarily conclusive upon the matter in controversy, for the common safety and peace of mankind."

The subject was very fully considered in the opinion of NORTON, J., concurred in by FIELD, J.,—later a distinguished Justice of this Court,—in the case of *California v. McGlynn*, 20 Cal. 233, 264. "A probate of a will of personal property is * * * a judicial determination of the character of the will itself. It does not necessarily or ordinarily arise from any controversy between adverse claimants, but is *necessary in order to authorize a disposition of the personal estate* in pursuance of its provisions." "In the United States the probating of wills is regulated in most States, and probably in all, by statutes in which the power to probate wills is conferred upon a special court, a Probate or Surrogate Court, corresponding in this respect to the ecclesiastical courts of England. Upon examining the decisions of the Supreme Court of the United States, and of the Courts of the several states, it will be found that they have uniformly held that the principles established in England apply and govern the cases arising under the probate laws of this country; that in the United States, wherever the power to probate a will is given to a Probate or Surrogate's Court, the decree of such court is final and conclusive, and not subject, except on appeal to a higher Court, to be questioned in any other Court." "In the case of *Durland and James v. Harrington's Heirs* (29 Ala. 95) the Court say: 'The probate of a will, under any circumstances, is a proceeding *in rem*. It operates upon the thing itself. It defines, and in a great degree, creates its *status*. The *status* thus defined adheres to it as a fixture; and the judgment or decree in the premises, unless avoided in some mode prescribed by

law, binds and concludes the whole world.' In the case of *Bogardus v. Clark* (4 Paige 625) the Court say: 'It [the probate of a will of personalty] is in the nature of a proceeding *in rem*, to which any person having an interest may make himself a party, by applying to the proper tribunal before which such proceeding is had, and *who will therefore be bound* by the sentence or decree of such tribunal although he is not in fact a party.' In *Woodruff v. Taylor* (20 Vermont 65) the Court say: 'The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is in form and substance upon the will itself.'"

This, being true of the probate, must be equally true of the administration of the estate within the jurisdiction of the state where probate is had. And this is recognized in the two decisions of this court which have been discussed under the Second Point, above.

Thus in *Thorman v. Frame*, it was said in reference to the grant of administration in Louisiana in its relation to the probate proceedings in Wisconsin: "Whatever the effect of the appointment, it must be as a judgment, and operate by way of estoppel. Now a judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them. This appointment cannot be treated as a judgment *in personam*, and as a judgment *in rem* it merely determined the right *to administer the property within the jurisdiction*, whether considered as directly operating on the particular things seized, or the general status of assets there situated."

The language of the opinion in *Overby v. Gordon* is to similar effect.

Clearly, then, the administration of the testator's estate which was in New Jersey at the time of his death, under the probate of his will in New Jersey was a proceeding *in rem*. And the same is true of the property in New York which was properly turned over

to the executors in recognition of their title, in conformity with the rule declared in *Schluter v. Bowery Savings Bank, supra.* The total estate which came into their hands was $1,108,079.71, all of which excepting $13,901.21 was in New Jersey at the time of Albert Tilt's death.

It is familiar law, in regard to proceedings *in rem* that the tribunal which first acquires jurisdiction and control, acquires not only the right, but the duty as well, to proceed to complete administration, and the rights of all parties in interest having been determined, to direct and enforce final distribution among the parties entitled according to their respective interests.

Thus, in *Peck v. Jenness*, 7 How. 612, 624: "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * * Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarassing to the administration of justice."

And, in *Peale v. Phipps*, 14 How. 368, 374: "The property, in legal contemplation, was in the custody of the court of which he [plaintiff in error] was the officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty. The case falls within the principle decided by this court in *Vaughn v. Northrop*, (15 Pet. 1,) in which it was held, that an

administrator could not be sued in another State for a debt due from his intestate, because he is bound to account for all the assets he receives, to the proper tribunals of the government from which he derives his authority. And that decision was made in a case where the assets, by reason of which the administrator was sought to be charged, were received in the jurisdiction of the government in which the suit was brought against him, but in which he had not taken out letters of administration."

Byers v. McAuley, 149 U. S. 608, 615, is directly in point. "An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and it is a possession which cannot be disturbed by any other court."

On this ground alone the administration and distribution should be held final and conclusive upon all claims and interests.

But it may properly be urged in the present case that there was also jurisdiction *in personam*, so far as such jurisdiction may be predicated of the administration of a decedent's estate.

The persons interested in the probate and the administration are the testator himself, represented by those whom he has named to carry out his will after his death, the beneficiaries named in the will, the heirs at law and next of kin. In addition to these are the creditors of the decedent, who have only the right to present and establish their claims, and to prevent distribution until their claims have been satisfied.

In the present case the executors necessarily submitted themselves to the jurisdiction. They could not obtain the property without it. The heirs and next of kin were all included among the beneficiaries named, all of whom accepted the jurisdiction by accepting their distributive interests on the final accounting.

In any point of view, then, the administration of this estate was lawfully vested in the courts of New Jersey, and has been lawfully carried out and completed in those courts. The executors were only responsible to those courts, and have faithfully performed the duties which they assumed, and have been fully discharged. They were and are accountable only in those courts. The succession has been accomplished without any aid from the courts of New York or the laws of that state.

If Albert Tilt had in reality been a resident of New York at the time of his death, and if, as was substantially true, all of his personal estate was actually within New Jersey at the time of his death, and if the claim of the State of New York of the right to subject that personal estate in New Jersey to a transfer tax was legally valid, and if, as was the fact, the will was probated in New Jersey, and there only, and administration was had in New Jersey, and there only, then it would seem to be manifest that such claim could only be asserted and enforced by presenting it in New Jersey and establishing it in the course of administration there. And so far as the validity of such claim depended upon the residence of the testator, that question, being thus raised in the very proceedings in which his residence in New Jersey had been found, would have been open to reconsideration, and, it must be presumed, would have been decided justly and fairly.

The courts of New Jersey, having jurisdiction over the subject matter and over the property, assumed jurisdiction to admit the will to probate on the sole ground that the testator was a resident of that state; and this was followed in due and orderly course by full and complete administration of the estate. That probate and administration are entitled to receive in the courts of New York the same full faith and credit to which they are entitled in the courts of New Jersey. That is to say, they cannot be attacked collaterally, and can only be vacated or annulled by direct proceed-

ings for that purpose in the courts which exercised that jurisdiction, or by appeal from the judgments of those courts.

The New Jersey record stands complete, and, upon the foregoing principles, is unassailable here. And if it is competent, in the face of this record, for the New York Surrogate to hold that the New Jersey Surrogate and the New Jersey Orphans' Court were without jurisdiction, the argument, carried to its logical result, leads directly to a *reductio ad absurdum*. If the probate court of New Jersey had not the jurisdiction which it assumed to exercise, to admit to probate the will of Albert Tilt and to issue letters testamentary thereon, then the probate goes for nothing, the will has never been proved, the will may never be proved, there are no executors, and there may never be any executors. Until the will shall lawfully be proved it cannot be known whether it is a valid will or not, and it cannot be known upon whom, or in what shares, the succession has devolved, and there can be no basis for fixing any taxes. And as the New York Surrogate has in no case jurisdiction over executors of a will which has not been probated in New York, still less can he have jurisdiction over the executors of a will which it finds has never been lawfully probated at all. Thus, to establish any foundation for its present claim, the State of New York, through its Comptroller, is compelled to prove itself out of court.

That this is a fair presentation of the logical consequences of the argument on behalf of the Comptroller is made still clearer by the ground upon which the jurisdiction of the New York Surrogate, to entertain and decide such questions, has been placed.

In *Matter of McPherson*, 104 N. Y. 306, it was said: "It is also objected that the act confers powers upon surrogates' courts not authorized by and contrary to the Constitution. There is nothing in the Constitution which in any way specifies or defines the powers or duties of surrogates. * * * Surrogates' courts

have always had jurisdiction of the administration, adjustment and settlement of the estates of deceased persons, and *the imposition and collection of this tax are simply incidents in the final settlement and adjustment of such estates.*"

Thus the New York Surrogate, in assuming to render this decision, is assuming to exercise a power which is an incident to the final settlement and adjustment of an estate over which he has never acquired any jurisdiction whatever, either by application for probate or by application for administration; an estate which in fact has been finally settled and adjusted by the proper courts of another state.

The decision in the present case violates the spirit, even more than the letter, of the constitutional provision regarding full faith and credit.

The only inquiry into the validity of the judgment of another state which this provision permits is an inquiry into the jurisdiction of the court which rendered it over the subject matter, over the parties, or, in the case of a proceeding *in rem*, over the *res*.

And such jurisdiction once being found, the judgment is conclusive. No further inquiry is permitted as to the correctness of the judgment or the sufficiency of the evidence upon which it was rendered. The power to decide, which jurisdiction confers, necessarily includes the power to render an erroneous decision, and an erroneous judgment. And experience shows that such decisions and judgments are often rendered. But the resulting injustice is not to be remedied by a retrial of the question in another proceeding in another court, either of the same state or of a different state. It must be corrected by an application to the original court for rehearing or a new trial, or by appeal to the lawfully constituted appellate tribunal.

This proposition is supported in a long and unbroken line of decisions in this court, as well as in the courts of the several states, and is not open to discussion. It is founded on the maxim, *interest reipublicae ut sit*

finis litium, wisely extended to comprehend the country as a whole, in the "more perfect union" of the states, which it was the purpose of the Constitution to establish.

The rule applies as well and with equal force to probate proceedings and administrations as to ordinary suits at law or in equity. *Simmons v. Saul*, 138 U. S., 439.

In the present case the decedent unequivocally intended to make his residence in New Jersey, and did everything possible to carry that intention into effect. He manifestly believed that he had accomplished that intention. He told his executors that he had done so. And he declared, under the solemnity of the execution of a codicil to his last will and testament that he was then a resident of New Jersey.

It was the duty of the executors to accept these statements, corroborated by the facts which were known to them, and wholly uncontradicted. There was no possible reason why they should doubt their truth.

Accordingly, as in duty bound, the executors presented the will for probate to the New Jersey Surrogate, as the will of a resident of New Jersey. It was duly and regularly admitted to probate as such, and letters testamentary to that effect were issued to them. It does not appear that any party in interest thought of raising any question as to the fact or as to the jurisdiction.

The administration proceeded in due and orderly manner. The debts were advertised for and paid. The succession taxes under the laws of the United States and under the laws of New Jersey were paid. The executors accounted for the whole personal estate of the testator, amounting to $1,108,079.71, and distributed the whole under the decree of the New Jersey court. They had fully performed their duties and the estate had been fully administered. The *res* had been distributed in accordance with all known interests. Unless it be for the State of New York, which had not

thus far uttered a claim or made a sign, all the world is satisfied and all the world is bound.

Is it tolerable that, in this situation, after all the purposes of probate and administration had been fairly and fully accomplished, the State of New York should be permitted to come forward, and, for the sole purpose of subjecting this estate to a transfer tax when not one dollar of the estate passed through its courts or reached the successors by the operation of its laws, to dispute and discredit this administration and its conclusive effect, on the ground that it proceeded on the wrongful assumption that the testator was a resident of New Jersey?

If this may be, then no administration is final, and no distribution is conclusive, and the protection of the Constitution is illusory.

POINT SIXTH. The order or decree of the Surrogate should be reversed and the proceeding dismissed, with costs.

WILLIAM G. WILSON,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 187.

ADELAIDE V. TILT and others, Plaintiffs in Error,

VERSUS

OTTO KELSEY, Comptroller, &c., Defendant in Error.

FURTHER BRIEF
for
Plaintiffs in Error.

It is maintained on behalf of defendant in error that the federal question was not raised early enough in the proceeding now under review, to give this court jurisdiction to consider it.

The proceeding was begun by an order of the Surrogate of New York County directing the appraisal by Robert Mazet, appraiser, of the property of Albert Tilt, deceased.

Under the Tax Law, § 230, the only jurisdiction of the appraiser is to fix the market value of property "of persons whose estates shall be subject to the payment of any tax imposed by this article."

It was held in *Matter of Bishop*, 82 App. Div. 112, 117, that the appraiser had no jurisdiction to pass upon the question of residence of the decedent, but that that must be decided by the Surrogate.

In the present case the appraiser assumed to determine the question of residence.

The plaintiffs in error moved to vacate the order founded upon the appraiser's report of residence, as made without jurisdiction ; and it was thereupon stipulated that the question of residence be submitted to the Surrogate for determination by him upon the proofs already taken and such further proofs as might be offered. This stipulation was made March 10, 1905.

Further proof was subsequently submitted, in the affidavit of Hamilton Wallis, verified March 24, 1905 (27). This evidence was first introduced on the hearing before the Surrogate.

The Surrogate alone had jurisdiction to pass judicially upon the question of the residence or non-residence of Albert Tilt. The stipulation provided that that question should be submitted to him for determination.

The appraisal proceeding is a mere inquiry. It is not the trial of an issue. There are no pleadings.

But the federal question was directly presented in the first notice of appeal to the Surrogate, in clause 5, asserting that the right to assess a tax in New York was barred by the administration and decrees in the courts of New Jersey, which were then in evidence upon the record. The faith and credit to which these decrees were entitled in the courts of New York was most emphatically a federal question.

But inasmuch as the appraiser had no jurisdiction to pass upon the question of residence, the motion of the executors to vacate and set aside the order on that ground and to stay proceedings until the question of residence should be judicially determined, and the submission of that question by consent to the Surrogate made the hearing thereon, which was subsequently had, the first and original trial of the questions now sought to be reviewed here.

It will not be denied that the federal question was *argued* on the hearing before the Surrogate. It is true

that he does not refer to it in his *opinion*. But his opinion is not his *decision* under the laws of New York. His decision is embodied in findings. Each party may propose the findings of fact and of law to which he deems himself entitled, and the Surrogate must pass upon all; and an exception to a finding or to a refusal to find is available on appeal from the order or decree which is entered upon the findings. Code of Civil Procedure, § 2545.

The first decision of the first judicial officer having jurisdiction to render such decision was a distinct denial of the right claimed by the executors that full faith and credit should be given to the proceedings and decrees of the courts of New Jersey, in his refusal to find the second conclusion of law proposed by them in their proposed findings; and their exception to this refusal preserved their right to review this decision for error in law.

The successive affirmances of the decree by the Appellate Division and by the Court of Appeals were necessarily affirmances of the judicial action of the Surrogate in denial of this right claimed under the federal constitution. And the dissent of Judges PATTERSON and INGRAHAM in the former, and of Judges GRAY and BARTLETT in the latter, indicates that in both appellate courts the judges thought that they were deciding the one and essential question of law in the case.

Thus the right was asserted and denied at the very first stage of the proceeding where it could be asserted before, or denied by, any one who had jurisdiction to pass judicially upon the question, and the right to review that denial was distinctly preserved.

The federal question was thus fully and emphatically raised, and is now properly before this Court.

WILLIAM G. WILSON,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. [redacted]18.

ADELAIDE V. TILT AND OTHERS, EXECUTORS, ETC., OF ALBERT TILT, DECEASED,

Plaintiffs in Error,

versus

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE M. JUDD,
Of Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 187.

ADELAIDE V. TILT, BENJAMIN B. TILT, JOSEPH W. CONGDON and JOHN R. CURRAN, as executors of the last will and testament and codicil of Albert Tilt, deceased,
Plaintiffs in Error,

VERSUS

OTTO KELSEY, Comptroller of the State of New York,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error (55) to review the determination of the Court of Appeals of the State of New York (50) and the judgment of the Surrogate's Court of New York County entered thereon (51) affirming an order of that Court (43) adjudging that Albert Tilt, the decedent, was a resident of the State of New York at the time of his death, May 2, 1900 (5) and that the personal estate of said Albert Tilt, wherever situated, is

subject to the payment of a transfer tax under the Tax Law of the State of New York.

Statement.

Albert Tilt died on the 2d day of May, 1900 (5), at his residence, No. 5 East Sixty-seventh street, New York City (17).

He left a last will and testament dated May 29, 1891 (28-33), wherein he is recited as "of the Borough of Manhattan in the City and State of New York," and a codicil thereto dated February 23, 1900 (33-34), wherein he is recited as "formerly of the Borough of Manhattan in the City and State of New York, now of the Borough of Mount Arlington, in the County of Morris and State of New Jersey." Upon the formal petition of the executors, which described the decedent as late of the Township of Roxbury in the County of Morris, New Jersey (25), said will and codicil were duly admitted to probate, and letters testamentary thereunder duly issued to the plaintiffs in error by the Surrogate of said Morris County, in the State of New Jersey (25).

Subsequently and on May 24, 1900, an order was made by the said Surrogate of Morris County, New Jersey, limiting the time of creditors of the estate of said decedent to bring in their claims, and on February 25, 1901, a further order that all such claims not presented and proved be forever barred (27).

Subsequently, and on February 23, 1901, a petition of one of the executors, praying that exemplified copies of the will, codicil and probate proceedings had before said New Jersey Surrogate might be recorded in the office of the Surrogate of New York County, was presented to the Surrogate of New York County, and thereupon, and on

February 26, 1901, an order was entered in said Clerk's office granting said application (27).

Subsequently, and on the 20th day of June, 1901, a decree of the Orphan's Court of Morris County, New Jersey, was made, passing the accounts of said executors and directing distribution of the money in their hands, which distribution was thereupon made, leaving no property in their possession (27-28).

Up to this time, although the decedent died seized and possessed of real and personal property in the State of New York (2-3, 6), no transfer tax proceedings had been brought therein, either by the executors or the State Comptroller, and no claim for the payment of a transfer tax had been asserted by said State.

But Section 220 of the Tax Law of the State of New York (Chapter 908, Laws of 1896 as amended) provides as follows:

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over * * * in the following cases:
>
> 1. When the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.
>
> 2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death." * * *

Section 230 of the same law as amended by Chapter 658, Laws of 1900, provides:

> * * * "In each county, the Surrogate, upon the application of any interested party, including the Comptroller of the State or county treasurers, shall, as often as, and whenever occasion may require, appoint a

> competent person as appraiser. * * * to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article," * * *

And Section 229 of the same law provides:

> "The Surrogate's Court of every county of the State having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a Surrogate in other matters or proceedings coming within his jurisdiction." * * *

Thereafter, upon the petition of the Comptroller of the State of New York an order was made, on August 16, 1901, by one of the Surrogates of New York County appointing Robert Mazet, Esq., as a transfer tax appraiser herein.

Subsequently, and on or about the 6th day of March, 1903, said appraiser filed his report in said Surrogate's office in and by which he found said decedent to be a legal resident of the State of New York, and thereupon appraised and assessed all his personal property, wherever situated (2-7).

An order fixing tax in accordance with said appraiser's report was entered in said Surrogate's office on the 15th day of June, 1903 (35).

From this order an appeal was taken to the Surrogate by the executors upon the following grounds (36-37):

"1. That the said Albert Tilt, deceased, at the time of his death, was a resident and citizen of the

State of New Jersey, but the said tax has been assessed and imposed upon the transfer of his personal property, which was in the State of New Jersey at the time of his death, and which was not subject to any transfer tax imposed by the laws of the State of New York.

2. That the said appraisement and the said order fixing the said tax were made without any authority or jurisdiction to appraise or to impose a tax upon the property of the testator in the State of New Jersey or upon the transfer thereof by said last will and testament and codicil.

3. That at the time when the said appraisement was made by the appraiser and the said tax was fixed by said order, the question of the residence of the testator at the time of his death had not, and has not since, been judicially determined, and the determination thereof by the appraiser and the fixing of said tax, so far as the same relates to the property of the testator in the State of New Jersey, or the transfer thereof, were made without jurisdiction or authority, and are void.

4. That as to the property of the testator which was in the State of New Jersey at the time of his death, the liability to taxation in this proceeding cannot be determined until it has been judicially ascertained that the testator was a resident of the State of New York.

5. That the right to assess or impose a tax under the laws of the State of New York upon the transfer of the property of the testator, if there ever was any such right, was barred before the commencement of this proceeding by a decree of the Orphans' Court of Morris County, New Jersey, a court of competent jurisdiction, made on the 25th day of

February, 1901, barring all claims against the said testator or his estate which had not been presented and proved to said executors, pursuant to public notice theretofore given and published, as prescribed by the laws of the State of New Jersey; and by the further decree of the same Court, made on the 20th day of June, 1901, directing the distribution of the estate of said testator in the hands of said executors, according to the terms of the will of the said Albert Tilt, deceased; in obedience to which the said executors, without any notice or knowledge of any claim or liability for the payment of a transfer tax under the laws of the State of New York, distributed the said estate, so that there was not at the time of the commencement of this proceeding, and is not now, any property of the said estate in the hands of said executors."

When the said appeal came on to be heard before the Surrogate a motion was also made by said executors, returnable at the same time, asking that the question of residence of said decedent be sent to a referee for determination on the ground that said transfer tax appraiser had not jurisdiction to take testimony with regard thereto nor to pass thereon.

A stipulation was thereupon entered into in and by which it was agreed that said question of residence should be submitted for determination to Surrogate Thomas upon the affidavits and depositions attached to the report of said appraiser and such further affidavits as either party might desire to present (37-38).

The only additional affidavit submitted in pursuance of such stipulation was one on the part of the executors, viz., that of Hamilton Wallis, verified the 24th day of March, 1905 (25-28).

Said Surrogate thereupon handed down an opinion that "On the evidence submitted I will de-

termine *as a fact* that the decedent was at the time of his death a resident of New York County" (38).

Said Surrogate subsequently made the following findings of fact and law (38-39):

"Finding of Fact.

"That at the time of the death of said Albert Tilt on May 2d, 1900, his legal residence was in this City, County and State of New York."

"Finding of Law.

"That the personal estate wherever situated of said Albert Tilt, at the time of his death, is subject to the payment of the transfer tax."

Said Surrogate at the same time refused to make certain findings of fact and law requested by the executors (39-41). Among the conclusions of law so refused were the following (41):

"1. The said testator, Albert Tilt, was a resident of the State of New Jersey at the time of his death.

"2. Under the constitution of the United States full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the State of New Jersey, and to the accounting and distribution made by his executors under the decree of the Orphans' Court of Morris County, in said State, of the estate of said Albert Tilt as a resident of New Jersey at the time of his death."

On the 5th day of May, 1905, an order was entered in said Surrogate's Court upon said Surrogate's decision, affirming the previous order fixing tax (42).

Said order of May 5th, 1905, was resettled and amended by a further order entered in said Surrogate's Court on the 17th day of May, 1905 (43-44).

On May 19th, 1905, said executors filed in the Surrogate's Court exceptions to the findings of fact and law made by the Surrogate and to his refusal to make the findings of fact and law presented by them (44-46). The 20th exception reads as follows (46):

"To the refusal of the said Surrogate to find as a conclusion of law that under the constitution of the United States full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the State of New Jersey * * *"

From said Surrogate's order of May 5th, 1905, as amended by said order of May 17th, 1905, an appeal (1) was taken by the executors to the Appellate Division of the Supreme Court of the State of New York, First Department, wherein the said order of the Surrogate was affirmed without opinion by an order (48) duly entered in the office of the Clerk of said Appellate Division on the 7th day of July, 1905 (Matter of Tilt, 107 App. Div., 616).

From said order of the Appellate Division an appeal (49) was taken by the executors to the Court of Appeals, wherein the order of the Appellate Division was affirmed without opinion (*In re* Tilt, 182 N. Y., 657), and the record was remitted to the Surrogates' Court (50-51), where final order of affirmance was entered October 18, 1905 (51), which is now brought here upon writ of error (55).

Argument.

Before taking up the merits of this case, it seems desirable to ask the Court to consider the question of jurisdiction.

It is not believed, from a consideration of the facts heretofore presented, that this Court has jurisdiction of the writ of error so as to permit a re-

view of the judgment of the Court of Appeals of the State of New York affirming a decree of the Surrogate's Court holding that as a matter of fact Albert Tilt, the decedent, was a resident of New York City, for the reason that no federal question has been specially or properly raised in the trial or Surrogate's Court, nor has such a question been properly raised therein under the decisions of the Court of Appeals so as to permit said Court to pass upon and determine the same; and for the further reason that the question of the residence or domicil of the decedent was the sole question presented to the Surrogate's Court for consideration, and that in affirming the decree of the Surrogate's Court holding the decedent as a matter of fact a resident the decision of the Court of Appeals rests upon an independent ground of law, not involving any Federal question, to wit, the weight and sufficiency of the evidence presented to the Surrogate, and such decision is not reviewable by this Court under the writ of error.

POINT FIRST.

This Court has not jurisdiction of the writ of error.

The jurisdiction of this writ of error depends upon the provisions of Section 709 of the Revised Statutes as amended by the Act of February 18, 1875 (Section 25 of Judiciary Act of 1789), which, so far as applicable, are as follows:

> "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any

> treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

In construing this provision, as affecting the question of jurisditcion, Mr. Justice Gray says, in Morrison *v.* Watson (154 U. S., 111), at p. 115:

> "In order to give this Court jurisdiction of a writ of error to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. *If it was not claimed in the trial Court and therefore, by the law and practice of the State, as declared by its highest court, could not be considered by that Court;* or if it was not claimed in any form before judgment in the highest court of the State; *it cannot be asserted in this Court.* Rev. Stat., §709; Spies *v.* Illinois, 123 U. S., 131, 181; Brooks *v.* Missouri, 124 U. S., 394; Chappell *v.* Bradshaw, 128 U. S., 132, 134; Brown *v.* Massachusetts, 144 U. S., 573; Schuyler National Bank *v.* Bollong, 150 U. S., 85; Miller *v.* Texas, 153 U. S., 535."

The meaning of the phrase "specially set up or claimed" used in said Section 709 of the Revised Statutes, has been defined by Mr. Justice Harlan in Oxley Stove Co. *v.* Butler County (166 U. S., 648), at page 654:

> "These words (specially set up or claimed) were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat., 85) and were

> inserted in order that the revisory power of this Court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights, the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and *unless he does so declare 'specially' that is, unmistakably,* this Court is without authority to re-examine the final judgment of the state court."

It is contended that the Federal question was not "specially set up or claimed" at the proper time and in the proper way.

A. It was not specially set up or claimed before the decision rendered by the Surrogate of New York County upon the appeal to him.

An examination of the record in this case will show that no Federal question whatever was raised before the Transfer Tax Appraiser, either in the testimony taken before him upon the question of the residence of decedent (14-24), or in the affidavit of Hamilton Wallis (8), or in the affidavits of Benjamin B. Tilt (8-11, 13), or in the affidavit of Joseph W. Congdon (11-12).

Neither does the report of the appraiser show any Federal question (2-7).

The Federal question does not appear and was not raised in the notice of appeal (36-37) to the Surrogate from the order fixing tax entered upon the appraiser's report.

It was not raised in the stipulations entered into between the respective attorneys agreeing to submit the question of the residence of the decedent to the Surrogate upon the foregoing affidavits and

depositions attached to the report of the appraiser and such further affidavits as may be presented (37-38). These stipulations were the result of a motion made by the executors after the notice of appeal was filed, in which they objected to the jurisdiction of the appraiser to pass upon the question of residence and asked to have the question sent to a referee to be determined. This motion and the appeal from the order fixing tax were argued together before the Surrogate.

The Federal question was not "specially set up or claimed" in the additional affidavit of Hamilton Wallis (25-28) presented to the Surrogate under the terms of the foregoing stipulations.

The affidavits and depositions above set forth contain all the evidence presented to the Surrogate upon appeal and the said Surrogate thereupon rendered the following decision (38):

> "On the evidence submitted I will determine as a fact that the decedent was at the time of his death a resident of New York County."

The opinion of the Surrogate itself shows not only that no Federal question was entertained by him, but on the contrary that he simply determined the question of residence as a matter of fact upon the evidence presented to him.

After the decision of the Surrogate was rendered the executors presented to the Surrogate certain requests to find, all of which were refused (39-41). In the second conclusion of law thus requested the Federal question for the first time appears in the following language:

> "Under the Constitution of the United States full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the State of New Jersey, and to the accounting and distribution made by his executors under the decree of the

> Orphans' Court of Morris County in said State, of the estate of said Albert Tilt as a resident of New Jersey at the time of his death."

Thereafter, upon motion of the State Comptroller, an order of affirmance was entered by the Surrogate and resettled (42-44), in which it was

> "ordered and adjudged that the legal residence of said Albert Tilt was within the State of New York at the time of his death; and that said personal estate of said Albert Tilt, wherever situated, is subject to the payment of a transfer tax under the Tax Law of the State of New York."

No reference to the Federal question appears in the recitals or in any part of the said order.

Subsequent to the entry of said order the executors filed in the Surrogates' Court exceptions to the refusal of the Surrogate to find the findings of fact and conclusions of law theretofore presented by them (44-46). The 20th exception (46) sets out in exactly the same language the 2nd conclusion of law heretofore set out as requested by them and refused by the Surrogate.

The Federal question (as thus attempted to be presented by the executors to the Surrogate in a request to find after said Surrogate had rendered his opinion, and again in an exception to the refusal of the Surrogate to make such finding filed in the Surrogate's Court after the entry of an order upon the Surrogate's decision) was not "specially set up and claimed at the proper time and in the proper way," as pointed out by Mr. Justice Gray in Morrison *v.* Watson, *supra,* so as to permit that question to be determined either by the Surrogate or by the Court of Appeals for the reason that

B. It has been decided by the Court of Appeals of the State of New York that the only questions

on appeal which can be reviewed by it or by the Surrogate are those presented by the appellants in the notice of appeal to the Surrogate, and the notice of appeal to the Surrogate does not raise a Federal question.

Section 232 of the Tax Law of New York (Chapter 908, Laws of 1896 as amended) provides as follows:

> "* * * The Comptroller of the State of New York or any person dissatisfied with the appraisement or assessment and determination of tax, may appeal therefrom to the Surrogate within sixty days from the fixing, assessing and determination of tax by the Surrogate as herein provided, upon filing in the office of the Surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken. * * *"

The Court of Appeals of the State of New York have construed this provision of the Tax Law and have determined that only the questions raised in the written notice of appeal can be reviewed by that Court as well as by the Surrogate in the two following transfer tax cases.

In Matter of Davis (149 N. Y., 539) the Court say, at page 547:

> "The respondent's appeal to the Surrogate was only from that portion of the decree which directed the County Treasurer to add interest at the rate of ten per cent. from January 16, 1887. She did not appeal from the appraisal or valuation of the estate, or from the assessment of the tax. Upon that appeal the learned Surrogate was not authorized to reverse the entire decree, to make a new appraisal or valuation of the estate, or to interfere with any portion of it except that appealed from, as it is a well-settled rule that only the parts of a judgment or decree which are appealed from can be reviewed. (Sands *v.* Codwise, 4 Johns., 536;

Kelsey *v.* Western, 2 N. Y., 500; Robertson *v.* Bullions, 11 N. Y., 243; Murphy *v.* Spaulding, 46 N. Y., 556.)"

"Moreover, Section 13 of Chapter 399 of the Laws of 1892 (re-enacted without change in Section 232 of Chapter 908, Laws of 1896), provides that upon such an appeal the notice shall state the grounds upon which it is taken, and where the statute requires the grounds of the appeal to be stated, none except those specified can be considered. The hearing must be limited to the errors noticed in the appeal. Otherwise the requirement of the statute would be without significance. It follows that the value of the estate transferred to the respondent and the tax to be paid thereon, were established by the decree of October 15, 1894, and as that portion of the decree has never been appealed from or properly reversed, it is conclusive between the parties upon those questions."

In Matter of Manning (169 N. Y., 449) the executor of the estate of John A. Manning appealed to the Surrogate from the order assessing the Transfer Tax on the sole ground that a worthless account, to wit, an item of $17,446.92 had been erroneously included in the assets upon which the tax was based. A question as to the correctness of the executor's commission was attempted to be raised on appeal. The Court at page 451 said:

"Moreover, the statute which permits an appeal from the order of the Surrogate required the appellant to state in the notice of appeal 'the ground upon which the appeal is taken' (Laws of 1892, ch. 399, Sec. 13). The only ground in the notice of appeal is the order of the Surrogate in regard to the valuation of the item or account referred to. This appeal was brought by the executor, and the public authorities acquiesced in everything decided by that order. If the Surrogate had committed an error in adjusting the commissions of the executor at

> too large a sum, they, also, could have appealed from his decision and required him to modify it in that respect. *The purpose of requiring the notice of appeal to the Surrogate to state the grounds the appeal is made upon was to limit the questions to be reviewed by him to those only stated in the notice.* The contention on the part of the public authorities has been, from the first, that the item of the account was taxable the same as the rest of the estate. *The notice of appeal to the Surrogate brought up before him only that single question, and neither the Supreme Court nor this Court can review any question except that reviewed by the Surrogate,* and so, we think, the order must be affirmed with costs."

It has been heretofore shown that no Federal question was raised either in the proceedings before the transfer tax appraiser or in the grounds of appeal set out in the notice of appeal to the Surrogate (36-37). Even in the affidavit of Hamilton Wallis (25-28), presented to the Surrogate by virtue of a motion made and stipulation entered thereupon subsequent to the notice of appeal, and considered by the Surrogate before rendering his decision, no such question is specially set up or claimed.

Therefore a Federal question could not, under the decisions of the State of New York, have been considered either by the Surrogate or by the Court of Appeals.

C. The record in this case shows that neither the Surrogate, nor the Appellate Division nor the Court of Appeals considered a Federal question.

It appears from the record that no objection whatever was made before the Transfer Tax appraiser as to his jurisdiction to pass upon and determine the question of residence.

In the notice of appeal to the Surrogate (36)

the executors say that when the appraisement was made by the appraiser the question of the residence of the testator at the time of his death had not and has not since been judicially determined, and that as to the property of the testator which was in the State of New Jersey the liability to taxation *in this proceeding* can not be determined until it has been judicially ascertained that the testator was a resident of the State of New York.

That thereupon the executors entered into a stipulation agreeing to submit the question of residence to the Surrogate for his determination upon the affidavits attached to the appraiser's report and the further affidavit of Hamilton Wallis (37-38).

The Surrogate then renders an opinion that "On the evidence submitted I will determine *as a fact* that the decedent was at the time of his death a resident of New York County."

The order entered upon this decision (43-44) recites:

> "And said executors having thereupon moved this Court that said order of June 18, 1903 (the order fixing tax), be vacated and set aside as made without jurisdiction, or that further proceedings be stayed until it should be judicially determined whether or not said Albert Tilt was a resident of the State of New York at the time of his death within the meaning of the Tax Law of New York; and said motion and said appeal coming on to be heard together to be heard, and the respective parties having thereupon stipulated that said question as to the residence of said Albert Tilt should be submitted to the Surrogate for determination by him upon the affidavits and depositions attached to said report of the appraiser, and upon the affidavit of Hamilton Wallis, verified March 24, 1905, and the said Surrogate having, upon such submission made his findings determining that said Albert Tilt was at the time of his death a resident of the State of

> New York, and that his personal estate, wherever situated, is subject to the payment of a transfer tax." Ordered, etc.

The Appellate Division affirmed the order of the Surrogate without opinion (Matter of Tilt, 107 App. Div., 616).

The Court of Appeals affirmed the order of the Appellate Division without opinion (*In re* Tilt, 182 N. Y., 657).

It thus appears that the only question considered by the Surrogate was the question of the residence of the decedent, which was a question of fact.

As was said in Dupuy *v.* Wurtz (53 N. Y., 556), at p. 562:

> "The question what shall be considered the domicil of a party is in all cases rather a question of fact than of law."

When, therefore, an appeal was taken from the order of the Surrogate to the Court of Appeals, the only question presented to said Court was the question of law as to whether there was any evidence to support the decision of the Surrogate.

This was an independent question of law, not involving any Federal question; and as stated by Mr. Justice Gray in Dower *v.* Richards (151 U. S., 658), at p. 666:

> "If the decision of the State Court rests on an independent ground of law, not involving any Federal question, this Court has no jurisdiction. New Orleans Waterworks *v.* Louisiana Sugar Co., 125 U. S., 18; Eustis *v.* Bolles, 150 U. S., 361; California Powder Works *v.* Davis, 151 U. S., 389."

Furthermore, it must *affirmatively* appear that a Federal question was raised and presented to the Court of Appeals for decision and that such question was decided.

See Adams County *v.* Burlington & Mo. R. R. Co. (112 U. S., 123), wherein Mr. Chief Justice Waite says, at p. 123:

> "To give us jurisdiction of a writ of error for the review of the judgment of a State court, it must appear affirmatively, not only that a Federal question was raised and presented for decision to the highest court of the State having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered. The cases to this effect are numerous. Murdock *v.* Memphis, 20 Wall., 590, 636; Chouteau *v.* Gibson, 111 U. S., 200."

See also to the same effect the opinion of this Court by Mr. Chief Justice Fuller in California Powder Works *v.* Davis (151 N. Y., 389), at p. 393.

No opinion in the present case was written by the Court of Appeals of the State of New York, and, therefore, it does not appear affirmatively that a Federal question was presented thereto for consideration. On the contrary, as has heretofore been shown, the only question presented to that Court was one of law as to whether there was any evidence to support the decision of the Surrogate that the decedent, as matter of fact, was a resident of New York County.

If, however, this Court shall determine that the Federal question was properly raised in the Surrogate's Court of the State of New York and was considered and passed upon by the Court of Appeals of that State so that this Court has jurisdiction of the writ of error, then the sole question brought here for consideration is whether the Surro-

gate of New York County had jurisdiction to take evidence and pass upon the question of the domicile of decedent, notwithstanding that said decedent's will had already been admitted to probate by a Surrogate of New Jersey as that of a resident of that State.

The position of the plaintiffs in error with regard to the question of the residence or domicile of the decedent is an anomalous one. They claim in their brief that the Surrogate of New York County is concluded as to that question by the probate of the will of decedent in New Jersey, and yet they appear upon the record as conceding before the Surrogate of New York County in their notice of appeal to him (36), which appeal was filed three years after said will was proved in New Jersey, that the question of residence has not been judicially determined and that the liability of the property of decedent to taxation in the transfer tax proceedings in New York cannot be determined until it has been judicially ascertained that the testator was a resident of New York. Moreover, in their brief submitted to this Court they set out the facts of residence taken before the New York Transfer Tax Appraiser and argue that those facts show that the testator was a legal resident of New Jersey.

If the probate decree in New Jersey is conclusive upon the Surrogate of New York upon the question of residence, the facts of residence need not be considered and will not be considered by this Court.

If the probate decree in New Jersey was not conclusive and the Surrogate of New York County has jurisdiction to pass upon the question of residence, then this Court cannot review the facts of residence presented to said Surrogate, for the question of residence so presented is a question of fact and on appeal to the Court of Appeals be-

comes an independent question of law, not involving any Federal question.

New Orleans Waterworks *v.* Louisiana Sugar Co., *supra;*
Eustis v. Bolles, *supra,* and
California Powder Works *v.* Davis, *supra.*

The attention of the Court is therefore called, as stated above, to the sole question presented for their consideration, viz.:

POINT SECOND.

Can the Surrogate of New York County take testimony and pass upon the question of the domicile of the decedent for the purposes of a transfer tax proceeding, in view of the fact that the will of decedent has prior thereto been admitted to probate as that of a resident of the State of New Jersey by the decree of the Probate Court of Morris County in that State and letters testamentary thereupon duly granted to the plaintiffs in error?

The particular attention of the Court is called, at this point, to the peculiar facts of this case.

The testator, Albert Tilt, at the time of his death owned a house in New York City, where he resided during the fall and winter months, and another house in Morris County, New Jersey, where he resided during the summer months.

At his death his executors upon a formal petition, alleging among other things that he was a resident of said Morris County, New Jersey, procured his will to be probated in said county and letters testamentary were thereupon duly issued to said executors by the Surrogate of said county.

No proof whatever as to residence other than said statement was presented to said Surrogate. Neither was any transfer tax proceeding instituted by the executors in the Sate of New York, although the decedent died seized and possessed of real and personal in that State.

One year and a half after the death of the testator the Comptroller of the State of New York began a transfer tax proceeding in New York County for the appraisal of his estate and such proceedings was thereupon had before the Transfer Tax Appraiser and such testimony taken that said appraiser found the testator to be a legal resident of the State of New York and an order was entered to that effect. Upon appeal from said order three different courts of the State of New York have concurred in holding that the testator was a resident of that State.

Will this Court hold in an involuntary transfer tax proceeding brought by the State Comptroller that no evidence can be taken as to the domicile of this decedent because his will has been admitted to probate by a probate court of New Jersey—a proceeding to which the Comptroller was not a party? If so, then every resident of New York, who owns a summer home in another State can escape taxation. All his representatives have to do is, immediately upon his death, to probate his will in the Probate Court of the county where the summer home is located, without notice to the Comptroller. When the Comptroller learns of his death, months or years afterward, and brings a transfer tax proceeding, his repesentatives can say: "the decedent

is a non-resident, you are concluded from taking evidence on that point by a decree of a probate court of another State."

A. *The decree of a Probate Court is in the nature of a proceeding in rem, and therefore any ground or fact upon which that decree professes to be founded can be inquired into in a proceeding in another state, brought by a person not a party to the probate proceedings.*

In the Mutual Benefit Life Insurance Co. *v.* Tisdale (91 U. S., 238), an action was brought by Mrs. Tisdale upon a policy of insurance issued to her upon the life of Edgar Tisdale, her husband. Evidence was given tending to show his death on Sept. 24, 1866, and plaintiff offered in evidence letters of administration upon his estate, issued to her as administratrix as evidence of death.

Mr. Justice Hunt delivered the opinion of the Court, and at p. 241 says:

> "* * * do letters of administration "upon the estate of such party, issued by the "proper Probate Court, afford legal evidence "of his death? This is * * * the only "question in the case.
>
> "The chief ground of argument to admit "letters testamentary as evidence of the "death of the party is, that the order of the Probate Court issuing them is an order or "judgment *in rem.* But a judgment *in rem* "is not *prima facie* evidence: it is conclusive "of the point adjudicated, unless impeached "for fraud. 1 Stark. on Ev., 372 m.; Free-"man, *infra.*
>
> "Again: the Probate Court has never adjudicated that Tisdale was dead. Death was not the *res* presented to it. *Shall Mrs. Tis-"dale* receive letters of administration, was "the *res;* and upon that only has there been "an adjudication. Hubback, *supra,* 162 m."
>
> "The letters issued to an executor or an administrator by a probate Court are, as a

general rule, evidence only of their own existence. They prove, that is to say, that the authority incident to that office or duty has been devolved upon the person therein named, that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life. Different States have different provisions as to who may be executor or administrator, excluding some persons and preferring others, in the order and manner in their statutes specified. * * * Certain notices may be and usually are required to be given of the proceedings to obtain letters; and *the letters are the evidence that the proceedings have been regularly taken, and that the person or persons therein named are those by law entitled to the office.* Upon these points the Court has adjudicated. No proof to the contrary can be admitted in an action brought by the executor as such. Parties wishing to contest that point must do it before the Probate Court at the time application is made for the letters.

"In an action brought by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased. The letters are conclusive evidence of the probate of the will. It cannot be avoided collaterally by showing that it is a forgery or that there is a subsequent will. The determination of the Probate Court is upon these precise points and is conclusive. 2 Smith's Lead. Cas. (6th Am. ed.), 669; Vanderpool *v.* Van Valkenberg, 6 N. Y., 190; Collins *v.* Ross, 2 Paige, 396; Freeman on Judgments, 507, citing numerous cases.

"If the present suit were brought by the plaintiff as executor or administrator to collect a debt due to her deceased husband, or to establish a claim arising under a will, of which probate has been made by her, she would have been within these rules. The letters testamentary would not only have

been competent evidence but they would have been conclusive of her right to bring the suit, and unimpeachable except for fraud.

"Such, however, is not the case before us. The suit is by the plaintiff as an individual, to recover a debt alleged to be due to her as an individual. It is a distinct and separate proceeding, in which the question of the death of the husband has never been passed upon. That fact must be established by proof competent upon common-law principles.

"The books abound in cases which show that a judgment upon the precise point in controversy cannot be given in evidence in another suit against one not a party or privy to the record. This rule is applied not only to civil cases, but to criminal cases and to public judicial proceedings, which are of the nature of judgments *in rem*.

"A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and is of good moral character. This certificate is against all the world, a judgment of citizenship, from which may follow the right to vote and hold property. It is conclusive as such; but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant. Campbell *v.* Gordon, 6 Cr., 176; Stark *v.* Ins. Co., 7 Cr., 420."

In the light of the foregoing decision, the decree of the Surrogate's Court in New Jersey, granting letters testamentary is conclusive only upon the point adjudicated, to wit, Shall Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran receive letters testamentary? That was the *res*, and upon that only has there been an adjudication. Residence was not the *res* and it was not the point adjudicated; therefore said decree is not con-

clusive as to residence in a distinct and separate proceeding brought by the Comptroller of the State of New York to fix a transfer tax alleged to be due the State of New York.

In Brigham *v.* Fayerweather (140 Mass., 411), the defendants sought to introduce in evidence the adjudication of the Probate Court of that State admitting the will of testatrix to probate to prove the mental soundness and capacity of testatrix. The plaintiff was a party to the probate proceedings; the defendants were strangers to it.

In holding that the evidence was not admissible, the Court by Mr. Justice Holmes say at page 413:

> "A judgment *in rem* is an act of the sovereign power, and, as such, its effects cannot be disputed at least within the jurisdiction. If a competent court declares a vessel forfeited, or orders it sold free of all claims, or divorces a couple, or establishes a will—a paramount title is passed, the couple is divorced, the will is established, as against all the world, whether parties or not, because the sovereign has said that it shall be so (Cases cited). It does not follow, nor it is true that the judgment, because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded."
>
> "We may lay on one side, then, any argument in the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes."

Then, after stating that the decree necessarily proceeded on the ground that the testatrix possessed

sufficient capacity to make the will, Judge Holmes says:

> "The general principle is stated with substantial correctness by Sir James F. Stephen in his work on Evidence, Art. 42, 'Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party or privy and a stranger, except in the case of judgments of courts of admiralty condemning a ship as prize,' and some other judgments of a kindred nature."
>
> "Apart from precedent, there seems to be no satisfactory ground for treating the probate of a will as evidence of the testator's mental capacity on a collateral issue. For except in the comparatively small number of cases where the probate of the will is opposed, the investigation of the fact is necessarily only formal." Page 414.
>
> "But the defendant was not a party in the sense that he was entitled to be heard, or to take an appeal, and unless he had that right, he was not concluded by the adjudication of facts, as has been shown."

The probate proceeding in New Jersey is similar to the probate proceeding in Massachusetts, mentioned in the foregoing decision, in that the proceeding was only formal; the probate of the will was not opposed; there was not a full and fair investigation of the facts; the State Comptroller was not a party in the sense that he was entitled to be heard, or to take an appeal, and unless he had that right, he was not concluded by the adjudication of facts upon which the decree is grounded.

The only evidence as to domicil presented to the New Jersey Probate Court consisted of the mere formal statement in the executors' petition that the decedent died a resident of Morris County, New Jersey. As there was no objection to the probate, "there was not a fair and full investigation of the

facts" and "an honest and intelligent deliberation" by the Probate Court over the question of domicil, for that question was not contested. This feature of a judicial proceeding is commented upon in Wigmore on Evidence, Vol. III., Section 1347, at page 1636, where in discussing the "effect to be given to a judgment in another court, and especially a foreign judgment," it is stated:

> "Not upon the mere existence of another Court's judgment will the second Court lend its own aid, but only for certain kinds of judgments from the other Court. If the present Court believes that there was in the other court a fair and full investigation of the facts, including a due summoning of parties bound to obey the summons, an opportunity for the full hearing of evidence on both sides, and an honest and intelligent deliberation by the tribunal over the evidence, then the present Court will lend its enforcing aid as if to its own judgment. • • • The important feature is that in either case —whether treating or not treating the judgment as conclusive—there is no process of judicial investigation, resulting in taking the judgment as the conclusive testimony to some ulterior and main issue before the Court, but there is merely a declining or a granting the Court's aid to carry out an order of another Court."

In Thorman *v.* Frame (176 U. S., 350), the United States Supreme Court say, at page 356:

> "In de Mora *v.* Concha, 29 Ch. Div., 268, it was held that the decree of a probate court was not conclusive *in rem* as to domicil, although the fact was found therein, because it did not appear that the decree was necessarily based on that finding; and it was doubted whether the findings on which judgments *in rem* are based are in all cases conclusive against the world. The decision was affirmed in the House of Lords, 11 App.

Cas., 541. The case is a leading and instructive one, was ably argued, and has been repeatedly followed since the judgment was pronounced."

In Overby *v.* Gordon (177 U. S., 214), the United States Court says, at page 223:

"Now, it is undeniable that the sovereignty of the State of Georgia and the jurisdiction of its courts at the time of the adjudication by the DeKalb County Court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding *in rem* relating to property within the jurisdiction of the Court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the State of Georgia. The decision in Robertson *v.* Pickrell, 109 U. S., 608, and in the cases there relied upon, furnish illustrations of this principle. Thus, in the case just named, it was held that the Act of Congress declaring the force and efficacy which the records and judicial proceedings of one State should have in the courts of another State did not require that they should have any greater force and effect in another State than in the State where such records and judicial proceedings originated and were had; that the probate of a will in one State, by a proceeding not adverse in character, merely established its sufficiency to pass all property which could be transferred in that State by a valid instrument of that kind, and the validity of the will in that State; and that such probate did not conduce to establish the facts upon which the probate proceeded, in proceedings respecting real property situated in another State, except as permitted by the laws of such other State."

In Black on Judgments (Second Edition), Vol. 2, Sec. 635, and in Woerner on the American Law of Administration (Second Edition), Vol. 1, p. 337, it is stated that the action of a Probate Court, having jurisdiction in admitting a will to probate or in rejecting it, is in the nature of a proceeding *in rem*.

Again in the same edition and volume of Black on Judgments, in Section 808, it is stated:

> "The judgments and decrees of courts of probate acting within the scope of their peculiar jurisdiction, are *quasi in rem*." • • •

Also in Section 794:

> "But where the proceeding is not strictly *in rem*, but belongs to the class of actions which are only *quasi in rem*, the Court cannot render a judgment which shall be valid against the rights of third persons, unless it is shown that such third persons have voluntarily appeared and become parties to the suit, or have had legal notice of the pendency of the suit and an opportunity to be heard therein."

Again in Section 795:

> "A judgment *in personam*, as we have already seen, is conclusive and binding only upon the parties to the action and those in privity with them, but not upon strangers. A judgment *in rem*, on the other hand, is conclusive and binding, not only upon parties and privies, but also upon strangers—upon all persons interested. It is commonly said that such judgment binds 'all the world.' It is more accurate to say that the judgment is conclusive against any person, in any subsequent controversy, where the grounds of the adjudication, or the fact of its rendition, or any of its legal consequences, become relevant and material facts. But it must be noted that this broad conclusiveness belongs only to judgments strictly *in rem*. In those

> proceedings which we have designated as *quasi in rem*, the adjudication is, in general, conclusive only upon the persons directly and immediately concerned, or who were made parties by service of process. This will more fully appear, in connection with particular instances, in the following sections. And further, a judgment *in rem* of a domestic as well as a foreign court, where jurisdiction over the person of a party has not been obtained except as to his interest in the property affected by the judgment, is not conclusive or binding upon him by way of estoppel in another action" (citing Durant *v.* Abendroth, 97 N. Y., 132).

Again, in Townsend *v.* Van Buskirk (22 App. Div., 441), the Court say, at page 445:

> "This Court, however, has adopted a different rule, which must now be considered as the settled law of this State. It is, that the sentence of a foreign court of admiralty condemning the property as a good and lawful prize, according to the law of nations, is conclusive to change the property, but it is only *prima facie* evidence of the facts on which the condemnation purports to have been founded; and in a collateral action such evidence may be rebutted by showing that no such facts did, in reality, exist (Vanderhauvel *v.* The United Ins. Co., 2 Johns. Cas., 451; New York Firemen's Ins. Co. *v.* Dewolf, 2 Cowen's Rep., 56). This case is cited with approval in Durant *v.* Abendroth, 97 N. Y., 132."

In Matter of Law (56 App. Div., 454), the testator, a resident of New York, died at his summer home in Connecticut. The will was probated in Connecticut as a will of both real and personal property. Subsequently one of the heirs at law applied to the Surrogate's Court of New York County for the probate of will, on the ground that the Connecticut Court had no jurisdiction to probate the

will. The Surrogate dismissed the application, and this appeal was taken.

The Court says, at page 456:

> "It cannot be legally questioned but that the facts averred in the petition, if undisputed, would entitle the petitioner to a probate of the will by the Surrogate of the County of New York. The petitioner makes compliance with all the statutory requirements and avers facts which, if true, establish jurisdiction in the court of this proceeding. We are called upon, therefore, to consider what effect, if any, is to be given to the determination and judgment admitting this will to probate by the Probate Court of Connecticut. It seems to have been concluded by the learned Surrogate that such decree was conclusive of every question which was sought to be presented, and bound the petitioner in accordance with its terms. The question before us is not new and has been the subject of repeated adjudication by the Federal courts and also by the courts of this State and elsewhere (Thormann *v.* Frame, 176 U. S., 350; Risley *v.* Phœnix Bank, 83 N. Y., 318; Schultz *v.* Schultz, 60 Am. Dec., 335, n. p. 353, *et seq.*; Bowen *v.* Johnson, 73 *Id.*, 49, n. p. 53 *et seq.*).
>
> As the decree is limited in its binding effect to the thing which it operates upon, it remains open to be controverted as to all the grounds and incidental facts upon which it professes to be founded (Durant *v.* Abendroth, 97 N. Y., 132)."

Even conceding that the probate proceeding in New Jersey is a proceeding *in rem*, as is claimed by the appellants, the decree of that probate court is not conclusive as to the question of residence, one of the facts upon which that decree is based, in a proceeding in this State between the State Comptroller (a stranger to that probate proceeding) and

the parties to that probate proceeding, for, as this Court say in Durant *v.* Abendroth, *supra,* at p. 140:

> "* * * Even if the bankruptcy proceedings are treated as proceedings in *rem,* the decree was not conclusive as to any fact, in a subsequent personal controversy between Abendroth (a stranger to the former proceedings), and the plaintiff."

It follows from the foregoing citations that the Surrogate, in a proceeding brought in this State by the Comptroller to fix the transfer tax upon the estate of the decedent, can inquire into the fact of the domicil of said decedent, for said fact was one of the grounds upon which the decree of the Probate Court of New Jersey was based in proceedings to which said Comptroller was not a party.

(B.) The Supreme Court of the United States has held that the Probate Court of one State does not possess the power to bind all the world conclusively as to the fact of domicile by a mere finding of such fact in an ex parte proceeding for the appointment of an administrator.

In Thormann *v.* Frame (176 U. S., 350) the will of Joseph Fabacher was offered for probate in the County Court of Waukesha County, Wisconsin, it being alleged that he died a resident of said county. On the day set for a hearing a daughter of testator appeared and objected to the admission of the will, claiming that testator was a resident of New Orleans, La. On the trial the Louisiana record was introduced in evidence, showing that letters of administration had been issued to said daughter by the Louisiana Court. The Court say, at page 353:

> "The contention is that the issuing of letters of administration to Mrs. Thormann by the Civil District Court of the parish of Orleans was an adjudication that Fabacher was domiciled in that parish at the time of

his death; that Mrs. Thormann was sole surviving heir; that he died intestate; that this adjudication was in all these respects conclusive against the world, and that the Wisconsin courts in admitting the will to probate did not give to the Louisiana proceedings that full faith and credit to which they were entitled under the Constitution and laws of the United States, and, therefore, denied a right secured thereby. * * *

"The question before us is whether the Supreme Court deprived Mrs. Thormann of a right secured to her by the Constitution and laws of the United States in holding that her appointment as administratrix of the succession of Joseph Fabacher was not a conclusive adjudication that Fabacher's domicil was at the time of his death in the parish of Orleans, Louisiana. * * *

"Yet the proceeding in Louisiana, instituted, it may be remarked, after the will was presented for probate in Wisconsin, amounted to no more than an *ex parte* application for letters of administration and a grant thereof. * * *

"Again, it is thoroughly settled that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the Court in which the judgment is rendered, over the subject matter, or the parties affected by it or into the facts necessary to give such jurisdiction (Thompson *v.* Whitman, 18 Wall., 457; Cole *v.* Cunningham, 133 U. S., 107; Grover and Baker Sewing Machine Co. *v.* Radcliffe, 137 U. S., 287; Simmons *v.* Saul, 138 U. S., 439; Reynolds *v.* Stockton, 140 U. S., 254; Cooper *v.* Newell, 173 U. S., 555).

"The point before us is a narrow one, but in any aspect in which it may be considered we are unable to assent to the view that the Supreme Court of Wisconsin was bound to treat the proceeding in Louisiana as conclusively determining the question of do-

> micil; and unless it was so bound its decision deprived plaintiff in error of no right secured to her by the Constitution and laws of the United States."

In Overby *vs.* Gordon (177 U. S., 214, decided April 9, 1900), a petition was filed in the Supreme Court of the District of Columbia on January 23, 1896, to obtain the probate of the will of one Hugh A. Haralson, and to obtain a grant of letters of administration thereon with the will annexed. It was averred in the petition that the decedent had died a resident of the District of Columbia. Subsequently, on March 6, 1896, a caveat was filed contesting the claim that the decedent was, at the time of his death, a resident of the District of Columbia, and averring that when he died he was a citizen and resident of the State of Georgia. Issues were framed upon the matters put in issue by the caveat and were ordered to be tried by the Court and a jury. At the trial, the caveators offered in evidence a certified transcript of the record from the De Kalk Court of Ordinary, De Kalb County, in the State of Georgia, showing the appointment in May, 1896, of Logan Bleckley administrator of the estate of the decedent, as tending to prove that the decedent had died a resident of De Kalb County, Georgia, and that the petitioner, offering the will for probate, was thereby estopped to deny that fact.

The Court say, at page 218:

> "Coming then to the merits of the controversy, we find presented for our consideration the single question, was the grant of letters of administration by the Court of Ordinary of De Kalb County, Georgia, competent evidence upon the issue tried in the Supreme Court of the District of Columbia respecting the domicile of the decedent at the time of his death?
>
> "In determining this question it is im-

portant to keep in mind the following facts:

"The transcript of record exhibiting such adjudication consits of: 1, an unverified petition of Logan Bleckley, as one of the next of kin and heirs at law of Hugh A. Haralson, asking that letters of administration be granted upon the estate of said deceased, upon the ground that he was a resident of the County of De Kalb at his death, and had died intestate, 'leaving an estate, undevised, of real and personal property of the probable value of ten thousand dollars'; 2, consents of certain of the next of kin to the appointment of Bleckley; 3, the order of appointment; and, 4, the oath of office of the administrator, in which is embodied an averment that the decedent died intestate, so far as affiant knew or believed.

"By Section 3393 of the Georgia Code of 1895 an application for the grant of letters of administration was required to be made to the ordinary of the county of the residence of the deceased, if a resident of the State, and, if not a resident, then in some county where the estate or a portion thereof was situated. * * *

"The order of appointment is recited to have been made at the May term, 1896. It reads as follows:

" 'The petition of Logan Bleckley for letters of administration on the estate of Hugh A. Haralson, deceased, having been duly filed, and it appearing that citation therein was issued and published according to law, requiring all concerned to appear at this term and show cause, if any they could, why said letters should not be granted; and it also appearing that said deceased died a resident of said county, intestate, and that said applicant is a citizen of this State and lawfully qualified for said administration, and no objection being offered thereto, it is therefore ordered by the Court that the said Logan Bleckley be, and he is hereby appointed administrator on the estate of said deceased, and that letters issue to him as

such, upon his giving bond, with approved security, in the sum of twenty thousand dollars, and taking and subscribing the oath as provided by law.'

"'As said in this Court in Veach *v.* Rice, 131 U. S., 293, courts of ordinary in Georgia are courts of record, having exclusive and general jurisdiction over the estates of decedents, and no question has been raised as to the observance of the requirements of the statutes of Georgia in the proceedings which culminated in the appointment of a Georgia administrator.

"The transcript referred to, however, undoubtedly only justifies the inference that none other than the statutory notice by publication was given, and that no consent was had in respect to the grant of letters. * * *

"The reasoning upon which we base the conclusion that the transcript of record of the grant of letters by the DeKalb County Court was not entitled to probative force in the courts of another State in the controversy over the administration of assets not within the territorial jurisdiction of the State of Georgia, at the time the grant of letters was made, finds support in the opinion delivered by Lord Blackburn in Concha *v.* Concha, 11 App. Cas., p. 541, a case referred in terms of approval in Thormann *v.* Frame, 176 U. S., 350, where was involved a controversy in some of its features analogous to that presented in the case at bar. The facts in the Concha case were as follows:

"After contest between a daughter of a decedent and the executors named in a document which purported to be a last will and testament, the paper was admitted to probate by a judge of a probate court in London, and he expressly decided, upon an issue framed in a contest between the daughters and executors as to the domicil of the decedent, in favor of the domicil being in England, and not in Chili, as was claimed

by the daughter. In a subsequent action before the Court of Chancery for distribution of the assets, the daughter again sought to litigate the question as to domicil of her father, and her right to do so was finally adjudicated by the House of Lords. The executors, or those who had succeeded them in the management of the administration suit, attempted to avail of the decree of the probate Court as conclusive upon the question of domicil, first, as a proceeding *in rem*, which operated an estoppel against all the world; and, second, as a proceeding *inter partes*, operative as *res adjudicata*, by reason of the actual contest made by the daughter. The decree of the Probate Court, however, was held not conclusive *in rem* as to the domicil, because the finding as to domicil was not necessary to the decree of the judge of probate, nor conclusive *inter partes*, as the pending controversy was substantially between the daughter and the residuary legatee, and as the latter could not be bound by an adjudication upon a question not necessary to be litigated in the Probate Court, and as estoppels must be mutual, the daughter could not be bound. This decision of the House of Lords, it will be borne in mind, was to the effect to be given in one judicial tribunal in England to the decision of another court of the same country. In the course of his opinion, Lord Blackburn (who perhaps had in mind doubts intimated in the Court of Appeals, 29 Ch. D., 268, 276, as to whether the findings on which a judgment *in rem* is based, are in all cases conclusive against the world) said (p. 562):

"'What he (the Probate Judge) did decide was (and to that extent, I think, the decision was conclusive on everybody), that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made that executor a good

executor according to the law of England; but I do not think that Sir Creswell Creswell had any power to say that the testator was or was not really a domiciled Englishman. If he had been a domiciled American or domiciled in any other country, I do not think that a decision of the Judge of our Probate Court, saying: "I find him to be a domiciled Englishman, and, therefore, on that account grant probate," would be at all conclusive upon the court of another country to oblige them to admit that he was a domiciled Englishman, when in fact he was not; or, putting it the converse way, that if a Chilian court had chosen to say that some very wealthy man was a domiciled Chilian, and had therefore granted probate, the law of nations would require that to conclude any person from saying in this country that he was not so." * * *

"We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicil of decedent, for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicil, by a mere finding of such a fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest.

"Our conclusion being that the adjudication of the fact of domicil in Georgia made in the grant of letters by the De Kalb County Court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicil in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in ex-

cluding the transcript in question whether tendered as evidence conducing to establish or as conclusively fixing the domicil of the deceased."

C. Leaving out of consideration the ex parte nature of the probate proceedings, in view of the fact that by Section 15 of the Statutes of New Jersey, residence of the decedent in the county is made one of the jurisdictional facts upon which the Probate Court of that county bases its decree admitting the will to probate, and in view of the further fact that an exemplified copy of the decree of that Probate Court has been offered in evidence by the appellant's claiming a benefit under it, it is a general rule of law that this court is not precluded from inquiring into the question of residence.

The fact that the record of the probate proceedings in New Jersey recites the jurisdictional fact of residence can make no difference.

The General Statutes of New Jersey, published by authority of the Legislature under acts of April 4, 1894, and March 20, 1895, contain the following provisions, re-enacted in Chapter 234 of Laws of 1898, and still in force (fols. 148-150):

Section 14, at p. 2358: "That the surrogates of the several counties of this State shall take depositions to wills, and admit the same to probate, and grant letters testamentary thereon; but in case of doubts arising on the face of the will, or a *caveat* is put in against proving a will, or a dispute arises respecting the existence of a will, the Surrogate shall not act in the premises, but shall issue citations to all persons concerned to appear in the Orphans' Court of the same county, which Court shall hear and determine the matters in controversy."

Section 15, at p. 2359: "That the application for the probate of the will of any person who was a

resident in this State at his decease, and for letters testamentary thereon, under the preceding section, shall be made to the Surrogate of the county in which the testator resided at the time of his death."

The record of probate proceedings in New Jersey was introduced in evidence by stipulation (38).

In Hard *v.* Shipman (6 Barb., 623, 624), the Court say:

> "The want of jurisdiction may always be set up against a judgment of a court, whether of general or special and limited jurisdiction, whenever such judgment is sought to be enforced or any benefit is claimed under it. * * * The jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. The record is never conclusive as to a recital or the statement of a jurisdictional fact, and the defendant is always at liberty to show a want of jurisdiction, although the record avers the contrary."
>
> See Starbruck *v.* Murray, 5 Wend., 158.

In Bolton *v.* Schriever, 135 N. Y., at page 73, the Court of Appeals by Mr. Justice Peckham, referring to the jurisdiction of Courts of Probate or Surrogate's Courts, says:

> * * * "Yet the facts upon which the jurisdiction is given to the Court of one county instead of to another are merely incidental * * * the main fact being the actual death of an individual who, at the time of his death, was an inhabitant of the State. That is the jurisdictional fact, upon the existence of which is founded the duty of the State to protect and distribute the property according to law."

In Matter of Law, 56 App. Div., 454, the Court say, at page 457:

> "It is a general rule of law that the judgment of a court of a foreign State has no binding force or effect in this State unless the Court has jurisdiction of the subject-matter and of the persons of the parties. Want of jurisdiction is a matter which may always be interposed against a judgment or decree when it is sought to be enforced, or when any benefit is claimed under it. The want of jurisdiction, either of subject-matter or person, renders the judgment a nullity, and it may be attacked in any form, either directly or collaterally (Kerr *v.* Kerr, 41 N. Y., 272; Pennoyer *v.* Neff, 95 U. S., 714, and cases already cited).
>
> Judgment of superior courts exercising general jurisdiction are attended by a presumption that they have been regularly and legally rendered, and when the record does not disclose that the Court acquired jurisdiction it will be presumed until the contrary appears (Chemung Canal Bank *v.* Judson, 8 N. Y., 254; Pacific Pneumatic Gas Co. *v.* Wheelock, 80 *Id.*, 278; Potter *v.* Merchants' Bank, 28 *Id.*, 641; Galwin *v.* Page, 18 Wall., 350). But where such Courts exercise a special statutory power not according to the course of the common law, no such presumption obtains, and they may be attacked collaterally (Steph. Dig. Ev. (Chas.'s Ed.), 97, 98, note, and cases cited). As to the judgments, however, of inferior courts, or those courts which exercise a limited jurisdiction, no such rule obtains. When such judgments are relied upon, it becomes incumbent upon a person asserting a right thereunder to prove that the law authorized the rendition of such a judgment, and that the steps taken to acquire jurisdiction both of the person and the subject-matter were duly had and taken according to the course of the law under which the judgment was assumed to be rendered, and facts necessary

to jurisdiction must be shown. The cases which we have already cited sustain this view.

A Surrogate's Court or a Court of Probate is an inferior court of limited jurisdiction, and is consequently subjected to the rule which we have announced (Matter of Hawley, 104 N. Y., 250)."

In Ferguson *v.* Crawford, 70 N. Y., 253, the Court say, at page 257:

"It is an elementary principal recognized in all the cases, that to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as the subject matter and that the want of jurisdiction over either may always be set up against the judgment when sought to be enforced or any benefit is claimed under it. There is no difference of opinion as to this general rule, but the point of difficulty is as to the manner in which this want of jurisdiction must be made to appear, in the case of a judgment of a domestic court of general jurisdiction, acting in the exercise of its general powers, when it comes in question in a collateral action. Whether when the record is silent as to the steps taken to bring the parties into court, it may be proved by evidence that they were not legally summoned and did not appear; or whether when the record recites that they were summoned or appeared, such recitals may be contradicted by extrinsic evidence; or whether the jurisdiction over the person and subject matter is a presumption of law which cannot be contradicted, unless it appears on the face of the record itself that there was a want of such jurisdiction, as in cases where the record shows that the service of process was by publication or some other method than personal.

On these points there has been as much diversity of opinion, especially between the

Courts of this State and those of other States, as upon any general question which can be mentioned, although there has as yet been no authoritative adjudication in this State on the subject. It is well settled by our own decisions that in the case of a judgment of a court of general jurisdiction of a sister State, although it is entitled to the benefit of the presumption of jurisdiction which exists in favor of a judgment of one of our own courts, yet the want of jurisdiction may be shown by extrinsic evidence, and that even a recital in the judgment record that the defendant was served with process, or appeared by attorney, or of any other jurisdictional fact is not conclusive, but may be contradicted by extrinsic evidence (Borden *v.* Fitch, 15 Johns., 121; 8 Am. Dec., 225; Starbuck *v.* Murray, 5 Wend., 148; 21 Am. Dec., 122; Shumway *v.* Stillman, 6 Wend., 447; Kerr *v.* Kerr, 41 N. Y., 272; Hoffman *v.* Hoffman, 46 *Id.*, 30; 7 Am. Rep., 299)."

See also head note in Thompson *v.* Whitman, 18 Wallace, 457, as follows:

"1. Neither the constitutional provision, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered.

2. The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the Court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

3. Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing.

4. By a law of New Jersey non-residents were prohibited from raking clams and

> oysters in the waters of that State under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel should be made were authorized, on information given, to hear and determine the case. Held, that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure brought in New York, notwithstanding the record of a conviction was produced which stated that the seizure was made within such county."

In Thorman *v.* Frame, 176 U. S., 350, the Court say, at page 356:

> "Again, it is thoroughly settled that the constitutional provision, that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction, Thompson *v.* Whitman, 18 Wall., 457; Cole *v.* Cunningham, 133 U. S., 107; Grover & Baker Sewing Machine Co. *v.* Radcliffe, 137 U. S., 287; Simmons *v.* Saul, 138 U. S., 439; Reynolds *v.* Stockton, 140 U. S., 254; Copper *v.* Newell, 173 U. S., 555."

D. The case of Plant v. *Harrison (36 Misc., 649), cited by plaintiffs in error distinguished.*

It is submitted that Plant *vs.* Harrison is a very different proceeding both in purpose and effect from the present one to fix a transfer tax, and that the decision therein does not control the present case.

In Plant *vs.* Harrison the facts are as follows: Henry B. Plant died, leaving a will with three codicils. In the will and first two codicils he de-

clared himself to be a resident of the City of New York and in the last codicil a resident of Connecticut. The widow, who was afterward the contestant and plaintiff in Plant *vs.* Harrison, filed a petition for the probate of the will in the Probate Court of New Haven, Connecticut, alleging that Plant was a resident of Connecticut, and the will was admitted to probate, No appeal was ever taken from that decree. Subsequently the widow brought an action in the Supreme Court of this State, entitled Plant *vs.* Harrison *et al.*, under Section 1861 of the Code, to procure a judgment establishing Plant's will as that of a testator domiciled and leaving property in New York City and asking to have the will construed and the residuary clause declared void as in contravention of the Statute of Perpetuities. Judge Leventritt decided that the decree of the New Haven Probate Court could be attacked collaterally by an action in this State, for the reason that the courts of Connecticut permitted such an attack upon its probate decrees, and the Federal Constitution declares that sister States shall not give a judicial proceeding less or greater eeffct than in the forum of its rendition. But the learned Justice said at page 677 that "*inquiry into the jurisdiction is always open* * * *." He further held that Plant was a resident of New York, and admitted the will to probate in this county and declared its residuary clause to be void.

It will thus be seen that the widow, who verified the petition which gave the Probate Court of Connecticut jurisdiction and was therefore bound by the resulting decree, was the plaintiff and contestant in Plant *vs.* Harrison to set that decree aside and establish Plant's will in the State of New York.

The present proceeding, however, is brought under the laws of the State of New York by the Comptroller thereof, *who was not a party to the*

probate proceedings in New Jersey and had no notice thereof, to ascertain the amount of transfer tax that may be due said State of New York from the estate of the decedent and to fix the amount of such tax. In ascertaining the amount of assets belonging to decedent so as to fix the amount of tax in this State, it has become necessary to inquire into the question of the domicile of the decedent. In doing so no attempt is being made to establish the will of decedent in this State, nor to construe the provisions of that will according to the laws of New York, nor to set aside the decree of the Probate Court of New Jersey, nor to ask that the assets of this estate be brought to New York and distributed according to its laws, as was the case in Plant *vs.* Harrison.

(A.) *The Surrogate of New York County had jurisdiction to take testimony and pass upon the question of the domicile of the testator.*

Section 220 of the Tax Law of New York, as amended (Chapter 908, Laws of 1896), provides as follows:

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over * * * in the following cases:
>
> 1. When the transfer is by will or by the intestate laws of this state from any person dying, seized or possessed of the property while a resident of the state.
>
> 2. When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death."

The Transfer Tax Appraiser's report (2-3, 6) shows that the decedent died seized and possessed of both real and personal property.

Section 230 of the same Tax Law (Chapter 908, Laws of 1896 as amended by Chapter 658, Laws of 1900) provides as follows:

> "The Surrogate, either upon his own motion, or upon the application of any interested party, shall by order direct one of such persons so designated as appraisers to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article."

Section 229 of the same Tax Law also provides:

> "The Surrogate's court of every county of the State having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction. * * *"

In construing the foregoing provision the Court of Appeals in Matter of Fitch (160 N. Y., 87) say at p. 91:

> "Neither letters testamentary nor ancillary letters were applied for or issued in this case, but that fact has no bearing whatever on the question involved, for the jurisdiction of the Court is to be determined by the answer to the question: Had the Court power to issue letters? If it had, then under the statute as it has been construed in the Embury and other cases, the Court had jurisdiction to impose the tax; if it had not such power, then the appellant's objection that the Surrogate was without jurisdiction is well taken. * * *
>
> "It is our view, after an examination of

> the provisions of Section 10 of the Act of 1892 (*supra*) (re-enacted as Section 229 in Laws of 1896, chapter 908) that the Taxable Transfer Act and the sections of the Code (No. 2476) providing for the granting of letters testamentary and administration, or of ancillary letters, should be read together as if constituting one enactment. Thus reading them, the taxing provisions of the act and the provisions providing the machinery for collection of the tax are in perfect harmony, and that which is held to be property within the meaning of that portion of the statute which provides that a tax shall be imposed upon its transfer, is also property for the purpose of conferring upon the Surrogate's Court jurisdiction to impose the tax."

Moreover, the plaintiffs in error not only raised no objection to the jurisdiction of the Transfer Tax appraiser to take testimony and pass upon the question of the residence of the testator, not only in their notice of appeal to the Surrogate of New York County claimed that that question had not been judicially determined (36), but also agreed to submit that question for determination to the said Surrogate (37-38).

Furthermore, the Appellate Division of the Supreme Court of the State of New York has held in a transfer tax proceeding brought by the Comptroller of the State of New York where it was claimed by the executors that the decedent was a resident of Massachusetts, that such question of residence shall be determined by the Surrogate of New York County (Matter of Bishop, 82 App. Div., 112).

In that case an executor appeared before the Transfer Tax appraiser and refused to answer questions as to the property of the decedent on the ground "that the appraiser had no jurisdiction to inquire into the affairs of the decedent or his property except so far as would be required to bring to

the knowledge of the Surrogate such property of the decedent as was liable to a transfer tax." The Court say, at page 115:

> "The first thing required is to bring him (the executor) within the operation of the law imposing the tax, and until he is brought within the operation of that law he has the right to say that he will make no disclosure of his private affairs or the affairs of his testator. Here, the liability cannot be determined until it has been judicially ascertained that the testator was a resident of the State of New York. * * * I think * * * that the executor should not be compelled to answer with reference to stocks in the foreign corporations until the question has been determined *by the Surrogate* as to the residence of David Wolfe Bishop."

In the Matter of Fitch (*supra*), wherein the assets of the estate of decedent, a non-resident, had been distributed, the Court held that the Surrogate of the county in this State in which the decedent's property was situated at the time of his death, still had jurisdiction to appoint an appraiser and fix the tax; that it was the duty of the executor to apply for an appraiser before the property was distributed.

Although it is not believed that this Court will consider either the facts or law of residence, in view of the fact that counsel for the plaintiffs in error has seen fit to discuss them at length, it would seem proper to set forth the views of the defendant in error as presented to the courts of the State of New York.

POINT THIRD.

Albert Tilt, the testator, was a legal resident of the State of New York at the time of his death.

It would first seem appropriate to make the following brief statement of facts concerning the question of residence as presented to the Surrogate of New York County.

Albert Tilt died in the Borough of Manhattan, City of New York, on the 2d day of May, 1900 (9). He left a will dated and executed the 29th day of May, 1891 (28-33), and a codicil thereto dated the 23d day of February, 1900 (33-34). In the will he describes himself as being "of the Borough of Manhattan, in the City and State of New York" (28), and in the codicil thereto as being "formerly of the Borough of Manhattan in the City and County of New York, now of the Borough of Mount Arlington, in the County of Morris and State of New Jersey" (33).

It is set forth in evidence that said decedent removed from Paterson, N. J., on or about the year 1888, and took up his residence in New York City (12), and became a citizen thereof, and as such continued to vote in said City of New York down to the year 1899 (13), and to pay personal taxes in the City of New York, down to and including the year of his death (13); that about the year 1889 he established and thereafter maintained to the time of his death a summer home at Arlington in New Jersey, whereat he was accustomed to spend the summer and some of the autumn months, and to keep the said house open throughout the year in charge of caretakers ready for occupancy (9); that for several years prior to his death and down to and including the year 1899, the decedent had

paid certain personal property taxes in the Town of Roxbury, N. J., wherein his summer home at Arlington is situated, and as well has paid taxes on his personal property in the City of New York (13); that said taxes for the year 1900 were paid after his death by his executors on the personal property assessed in the State of New Jersey, and upon his personal property assessed in the State of New York (13); that the decedent's house in New York City was kept open throughout the year and in his absence therefrom was in charge of caretakers and at all times was ready for occupancy (13); that the character of the said house and the method of maintaining and conducting the same were in no respects changed during the year prior to the death of the decedent from what it had been before that time (16); that during the summer of 1899, and while the decedent was in Arlington, New Jersey, it is set forth that he repeatedly expressed his intention of becoming a citizen of New Jersey and voting and paying his taxes there (9, 12, 18); that he returned from his summer home in New Jersey to his New York residence about the middle of October, 1899 (18), made his codicil there in February, 1900 (16), and remained continuously thereat until his death (16-17); that repeatedly in New York City, prior to making his codicil, he expressed his intention of becoming a citizen of New Jersey and establishing his domicile at Arlington, N. J. (14); that just before making his codicil, and while in New York City, he is alleged to have said that he had determined to change his domicil to New Jersey, and that "he made the codicil and that was to show that he had absolutely become a resident of New Jersey" (14, 18); that in said codicil the testator changed the testamentary trustee, a New York corporation (8), and substituted therefor a New Jersey corporation, and changed a New York executor

and substituted therefor a New Jersey executor (12); that about that time the decedent is alleged to have removed all of his securities from New York to New Jersey (12); that after making his codicil in New York City the decedent continued as thenbefore to remain in his New York City residence; that his New York establishment was maintained as thenbefore, and he continued to live thereat continuously until the time of his death; that he continued to keep his business office in New York City and on two occasions at least went to said office, which was his "main office," in the store of Greef & Company, 106 Spring street, New York City, the selling agents of the Phœnix Silk Manufacturing Company, in which company he was a large stockholder, and transacted business there (13); that at the time of his death the decedent was a member of several New York clubs and organizations and vestryman in All Souls Church on Sixty-sixth street and Madison avenue, New York City (15).

Particular attention is directed to the fact that the executor's principal witness, Benjamin B. Tilt, decedent's son, testified on direct-examination that during that last summer in New Jersey and *right up to the making of the codicil in New York* the decedent repeatedly stated that he thought of changing his residence to New Jersey (14).

It was only on cross-examination and by persistent questioning on the part of his counsel that the witness was led to say that his father had stated to him during the latter part of the summer that he had changed his residence to New Jersey. Even then his answers are not clear and specific, but more in the nature of statements that "he had decided to change his residence," not that he had actually changed it (17, 18, 22, 23). On redirect-examination (23) the witness was asked again to state what his father had told him during the sum-

mer about actual change of residence, and his answers show the same tendency:

"Q. You said on the direct-examination that he spoke during the summer as a great many others do that he thought he should change his residence to New Jersey? A. Yes.

"Q. And on the cross-examination you say that he did say that his residence was New Jersey; which do you want us to understand by that? A. Simply, he talked about it, and decided to change, and had changed in his mind; I don't know how a man could otherwise change."

"Q. You don't quite get my question. On the direct-examination, you answered to my question, that he was talking during that summer, as a great many other people do, about changing his residence, that he thought he should change his residence; now on the cross-examination, you say that he told you that he had changed his residence. A. He did the latter part of the summer; he had talked about it all during the summer—the latter part of the summer he decided absolutely to change."

General Congdon, decedent's business associate, says in his affidavit that the decedent during the summer of 1899 frequently stated to him that he "intended to take up his permanent legal residence there" (12), but that he did not tell him that "he no longer considered himself a resident of New Jersey" till just about the time of the making of the codicil in New York City (12).

Mr. Wallis, decedent's attorney, the remaining witness, says in his affidavit that before the execution of the codicil the decedent consulted with him about making changes in his will and told him that he had changed his residence to New Jersey, so that this conversation presumably also took place about the time of the execution of the codicil in New York City (8).

Argument.

The question under consideration rests on the determination whether the decedent was a resident or a non-resident of the State of New York, *i. e.*, whether his domicile was in the City of New York or at Arlington, N. J., at the time of his death.

I.—WHAT IS DOMICILE?

In the Matter of Thompson (1 Wend., 45) the Court held,

"The domicile is the habitation fixed in any place, with the intention of always staying there."

In the Matter of Hawley (1 Daly, 531):

"A man's domicile is that place where his family dwells, or where he makes his chief seat of his affairs and interests."

"Every person has a domicile of origin, which he retains until he acquires another; and the one thus acquired is in like manner retained until he acquires a third domicile. The existing domicile always continues until another is acquired. * * * The domicile of origin arises from birth or connections" (Crawford *v.* Wison, 4 Barb., 504-519).

"Every independent person can acquire a domicile of choice by the combination of residence (*factum*) and intention of permanent or definite residence (*animus manendi*), but not otherwise" (Dicey, Conflict of Laws, p. 104).

"A domicile of choice being gained, *animo et facto*, can be relinquished only in the same manner (Udny, *v.* Udny, 1 L. R., 1 Sc. App., 441), but both the *animus et factum* must be expressive of the present intention to reside presently and permanently in the domicile. Personal presence, coupled with the intention to begin in future a residence of however permanent character, is not sufficient

(Jacobs on Domicil, Sect. 177). Abandonment in fact of the old domicile, residence in the new locality and the intention to remain there are the essential requisites. The length of the residence in the new domicile is quite immaterial so long as the intention is *bona fide* and is consummated by an adequate act" (Leventritt, *J.*, Plant *v.* Harrison *et al.*, 36 Misc., 649).

The courts uniformly have held that a domicile once acquired continues until another is acquired (Crawford *v.* Wilson, 4 Barb., 504; Dupuy *v.* Wurtz, 53 N. Y., 556; Cruger *v.* Phelps, 21 Misc., 252); and that the burden of proof is upon the party alleging the change of domicile (Tucker *v.* Field, 5 Redf. Surr., 139; Campbell *v.* Campbell, 90 Hun, 233; Eng. & Am. Ency. of Law, Vol. 10, p. 12).

II.—What constitutes a change of domicile.

To effect a change of domicile there must be not only a change of residence but intention to abandon the former domicile and acquire another (Dupuy *v.* Wurtz, *supra*; Matter of Dimock, 11 Misc., 610; Cruger *v.* Phelps, *supra*). To effect a change of domicile there must be intention and act united (Crawford *v.* Wilson, *supra*), or as set forth by Judge Leventritt, in Plant *v.* Harrison *et al.* (*supra*):

"Abandonment in fact of the old domicile, residence in the new locality and intention to remain there are the essential requisites."

In the light of the foregoing decisions, let the evidence herein be examined and it will be seen that all that the alleged facts legally established is that Albert Tilt contemplated and intended, but never fully consummated his plan of legally and effectually changing his domicile from the City of New York to Arlington, N. J., hence he remained

and was at the time of his death a citizen of the City of New York. As has hereinbefore been shown, to change one's domicile, three things are essential and requisite, viz.: The intent to abandon the former domicile, the actual abandonment of the old and the taking up of the new domicile, and the intention of remaining permanently or indefinitely thereat.

1. *Is it established by evidence that it was the* bona fide *intention of the decedent to change his domicile from the City of New York to Arlington, N. J.?*

To establish such intention there are presented alleged statements of the decedent made during the summer of 1899 that he intended to remove his domicile from New York to New Jersey. These statements were made prior to any alleged actual change of domicile and must obviously have been offered either to explain alleged subsequent acts, or to furnish evidence to prove the domicile of the decedent. If for the former purpose, the evidence submitted is incompetent under the rule laid down in Kenna *v.* Brockhaus, 10 Bliss (U. S.), 128: "It is not competent for a party to prove his own declarations of intention, made before any act done, in order to give color to his subsequent act." If offered for the latter purpose, the evidence submitted is not admissible under the rule enunciated in Doyle *v.* Clark (1 Flipp. U. S., 536), viz.: "Declarations made by a person for the purpose of manufacturing evidence as to his domicile should be rejected."

2. *Is it established by competent evidence that the decedent herein ever did, either actually or constructively, abandon his New York domicile?*

The decedent returned from his Arlington abode to his New York domicile about the middle of Octo-

ber, 1899, and remained thereat until his death on the 2d day of May, 1900. The reason stated in evidence for his returning to his New York residence was that it was more comfortable there. Subsequent to his alleged declaration of intention of changing his domicile from New York to New Jersey, no overt acts were shown to have been performed by the decedent herein to furnish any proof that the act of change had ever been effectuated. Certainly no overt acts are shown that would seem to bear witness that his New York domicile was abandoned. There were no changes in his business plans; no changes in his manner of living in his New York domicile; no removal of any furniture or household effects therefrom; no change was made of any of his horses, equipages, &c., from New York to Arlington. In short, not a single conclusive act was performed, not a single change in home or household life subsequent to his alleged declaration expressed in the autumn of 1899. And at the time of the making of his codicil in February of the following year, nothing is in evidence that can be regarded as proof that his home in New York was in any respect different from what it had been prior to the fall of 1899. Not an individual, overt act was submitted that could be received as evidence of such change of residence, or that could in any manner be received as evidence to show that the New York domicile had ever been dwarfed into a commorant abode, or that the commorant abode at Arlington had ever been exalted in the eye of the law to the position of his domicile.

As we have shown, a person must have, but can have only, one domicile. For the purposes of taxation and otherwise, the public has a right to learn and know where that domicile is. It is not enough that the individual and his family know. His acts must inform the public of the same. When a person moves into a new abode, by that very act is

raised the inquiry as to whether or not it is his intention to occupy that abode as a commorant residence or as his domicile. All that his acts have done in moving into the new abode is to put the public on inquiry. The real intention of the inhabitant then becomes necessary to the determination of the answer to the inquiry. If it is his expressed, real intention to make that abode his fixed place of abode and to remain indefinitely thereat, he has satisfied the conditions imposed by law as necessary to the establishment of his domicile. Anything short of that fails to fulfill the necessary conditions. It is manifest that to change a commorant abode to a domicile more evidence is required, as there are greater difficulties to overcome, for the reason that a person moving into his commorant abode, at the accustomed time of year, by that very act raises the presumption that he is there to continue as a commorant resident of that place. Additional evidence will be required to overcome that presumption before the commorant abode will be on the same footing as a new abode in the fixing of a domicile. In other words, some acts must be performed to put the public on inquiry as to the intention of the individual in regard to his future use of his commorant residence and its establishment as a domicile.

3. *Is it established by competent evidence that the decedent herein intended to remain permanently or indefinitely at Arlington, his alleged new domicile, i. e., is the animus manendi herein shown?*

The only evidence before the appraiser bearing upon this point was in answer to the following question (16):

Q. "Did his (the decedent's) occupation of, or his mode of living at his New York residence, differ in

any respect after this alleged change of residence from what it was before such change?"

A. "He never intended to leave New York and live in New Jersey all his life. There was no difference; no. I think he lived a little longer in New Jersey—that is to say, his summer residence—his residence in Mount Arlington was longer by a month after he made the codicil than it ever had been before." Corrected by his attorney in regard to the latter part of the statement, the witness said: "I meant before just at that time."

In Mitchell *v.* United States, 21 Wall. (U. S.), 353, the Court held that the circumstances usually relied upon to establish *animus manendi* are declarations of party; exercise of political rights; payment of personal taxes; house of residence and place of business.

In Firth *v.* Firth (50 N. Y. Eq., 137), the Court held:

"The actual intention of a party whose domicile is in dispute * * * is a fact of great importance, but the best and most trustworthy evidence of it is found, as a general rule, in his acts rather than his declarations."

The declarations of the decedent herein as to his residence in the codicil to his will are not in anywise more conclusive as to his residence than any of his oral declarations. As was said in Isham *v.* Gibbons (1 Bradf., 69), in the determination of a similar question:

"The truth is, after all, that such written declarations, even of the most solemn character, are but facts to enable the Court to discover the intention of the party. In this light alone they are to be received and weighed. At the best, the animus of the party is only to be inferred from them. In this respect they are like any other facts. Declara-

tions of any kind are not controlling, but may be and frequently are overcome by other and more reliable indications of the *true* intention."

The decedent's changing his testamentary trustee and executor and his sending his securities over into New Jersey do not point definitely and exclusively to any one reason. They are but *indicia*, to be taken into consideration with his declaration of intent, and differ in no respect and have no more evidential weight than his oral declarations. At best they can be regarded only as evidence of his intent. A man's property is not his domicile, nor is a man's domicile determinable on the assumption that where his property is, there he is. What motive the decedent had or what his intent in making the said changes is not known, and, standing alone, cannot be argued for or against the question of establishing a change of domicile. The statement of the decedent alleged to have been made to his attorney before the drawing of the codicil to his will as to the fact that he was a resident of New Jersey and wanted that set forth in the codicil to his will as showing *bona fide* intent must be viewed in the light of the surrounding conditions and circumstances. For example, here was a man ill, under the doctor's care: and under the influence of morphine continually, and less than three months before his death making all these changes of executor, testamentary trustee and securities; what was his motive therein? The motive governing the intention has come to be regarded an essential fact to be considered in the determination of whether the intention to remain indefinitely at the alleged new domicile is real or otherwise. If the motive governing the intention be known, the alleged intention can then be measured as to whether or not it is the real intention. For example, if in any case the motive governing the real intention be to obtain a

domicile elsewhere so as to evade some legal responsibility or claim, or charge, or duty against the individual or his property, the courts would not recognize such an intention as being the intention contemplated in law as requisite in establishing the change of a domicile. Both oral and written declarations are unavailing without corroborative acts in the face of contradictory circumstances.

In Mackenzie *v.* Mackenzie, 3 Misc., 200, the fact that a testator in a trust deed had described himself as of Jersey City in the State of New Jersey was not regarded as conclusive in establishing a domicile thereat as against certain contradictory circumstances.

In the case of Isham *v.* Gibbons (*supra*), the facts that the decedent paid personal taxes in New York and recitals in a will and deed described him as of New York were held insufficient and inadequate proof necessary to overcome the fact that his principal place of abode was in New Jersey, although the decedent had not been at that principal abode for two years.

The declaration of the decedent herein that he had changed his residence to New Jersey cannot be held to be as strong as was the evidence submitted in the case of Lee *v.* Stanley (9 How. Pr., 272), wherein Stanley not only declared, but swore positively, that he was a citizen of New York, but yet the Court held adversely to his declaration.

In the affidavits submitted it is set forth that for many years prior to 1899 the decedent voted in New York City, but in 1899 it is set forth that he abstained from voting either in New York or New Jersey. That abstenance, however, must be viewed in the light of surrounding circumstances at election time. It must be considered in connection therewith that at election time decedent was seriously ill and, as one of the witnesses said, practically bedridden and continuously under the in-

fluence of morphine. He certainly was in the State of New York at the time of election and was not in the State of New Jersey at that time, and it is not contended that the decedent ever paid a poll tax in New Jersey, and certainly he never voted in New Jersey.

The decedent's taxes on his personal property were paid in New York City for many years prior to his death, and such taxes were assessed against him during the last year of his life and were paid in New York City by his executors after his death. The taxes which he paid at Arlington, N. J., were merely on the property which was in his Arlington residence throughout the year.

The New York residence of the decedent, as has hereinbefore been shown, was his chief residence and was his more comfortable residence. In New York City was the business office of the decedent; he was a member of political and social clubs and organizations in New York City and was a vestryman in All Souls' Church at Sixty-sixth street and Madison avenue, New York City, at the time of his death. In proving the establishment of a new domicile all the authorities agree that the burden of proof rests on the party asserting the change. In the absence of clear, abundant and conclusive proof of the establishment of a new domicile, the domicile established must be presumed to continue. It is respectfully submitted that the decedent herein did not comply with all the legal requirements necessary to effectuate a change of domicile from the City of New York to Arlington, N. J., hence the domicile of the decedent herein was in the City of New York when he died.

The circumstances surrounding this case are of great evidential value on the question of the establishment of a new domicile. Here is a man ill for about a year before his death. A month or two after he had been taken ill he is alleged to have

begun to talk about changing his domicile from New York to New Jersey, is alleged to have talked about it throughout the summer and in the fall and early winter is alleged to have said that he had changed his residence to New Jersey. When he returned to New York in the month of October "he was then seriously ill—he was practically bedridden." He was continuously ill after that time until his death which occurred in New York City. In answer to the question as to whether he removed to New York in the fall of 1899 for the purpose of living here through the winter the witness, the son of the decedent, answered "Well, it was—his most comfortable house was in New York and his office —the selling part of his business was here, of course, he had to be here quite a good deal, and being once ill he couldn't get out of the place" (17). In connection with the last part of this statement, attention is directed to the fact that the decedent was brought to New York seriously ill and in fact practically bedridden. In answer to the question as to whether or not and when the decedent considered himself a resident of New Jersey, the witness replied, "right along the latter part of that summer after he had talked about it so much; and then he made the codicil—that was to show that he had absolutely become a resident of New Jersey" (18). This change was effectuated as stated in the testimony of his son "simply he talked about it and decided to change and had changed in his mind" (23). In connection with the above statements it is to be recalled that the codicil of the decedent herein was not made in Arlington but in New York City, and was not made in New York City until about four months after he had returned from Arlington to New York City and was not made until about three months before his death.

It is submitted that all the evidence in this case and all the surrounding circumstances at the most

only prove that it was the mental purpose of the decedent herein to change his residence from New York City to Arlington, N. J., and in having that mental purpose he thought the act of change of domicile had been consummated.

It is contended that the declarations of the decedent were inadmissible as evidence for the purposes for which they were presented, and many of the statements submitted have no evidential value whatever for the establishment of change of domicile.

POINT FOURTH.

The order of the Surrogate should be affirmed and the writ of error dismissed, with costs.

GEORGE M. JUDD,
Of Counsel.